Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

Kenneth B. Wills, Petitioner

v.

John E. Potter, Postmaster General

Respondent

On Petition for Writ of Certiorari
To The United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

Kenneth B. Wills
Petitioner Pro Se
2510 McElroy St
Tallahassee, Florida 32310
850-210-3687

QUESTIONS PRESENTED

1. Whether the District Court erred by refusing to appoint counsel for Petitioner, or in the alternative, by refusing to post a request for pro bono help given the nature of Petitioner's disability and level of understanding?

2. Whether the District Court and the Court of Appeals erred in not applying the criteria and rule of law outlined in the Family Medical Leave Act concerning absences from work?

3. Whether the Court of Appeals abused its discretion or erred by not following the rule of law regarding exhaustion of administrative remedies as it pertains to futility?

4. Whether the District Court and Court of Appeals erred by finding the Petitioner "not disabled" although he established a prima facie case as outlined in the Rehabilitation Act, and the Family Medical Leave Act?

5. Whether the District Court erred by not applying the Federal Rules of Civil Procedure when it granted the Postmaster General summary judgment.

6. Whether the Court of Appeals erred in not considering the impact of the Lilly Ledbetter Fair

Pay Act of 2009 as it applies to Petitioner in Title VII proceedings for arguments concerning the continuing violations doctrine?

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OPINIONS BELOW

A timely petition for rehearing en banc was denied on March 23, 2009. (20a).

The opinions of the court of appeals are unpublished. The Eleventh Circuit Court of Appeals affirmed the District Court on November 21, 2008.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). The judgment of the court of appeals was entered on November 21, 2008. Jurisdiction of the court of appeals was invoked under 28 U.S.C. § 1291. Jurisdiction of the district court was invoked under 28 U.S.C. §§ 1331, 1343. A timely petition for rehearing *en banc* was denied on March 10, 2009.

STATUTORY PROVISIONS

The following are reproduced at Appendix D:

Title VII of the Civil Rights Act of 1964, 78 Stat. 255, 42 U.S.C. § 2000e-2(a)(1).

Title VII of the Civil Rights Act of 1964, as

amended,42 U.S.C. § 2000e-3(a).

The Civil Rights Act of 1991, 42 U.S.C. § 2000e2m.

The Family Medical Leave Act of 1993 (FMLA), Title II, 5 U.S.C. § 6318 et seq., § 6382, § 6383

The Anti-Retaliation Provision of Title II (FMLA), 5 U.S.C. § 6385.

The Lilly Ledbetter Fair Pay Act of 2009

STATEMENT OF THE CASE

Introduction

1. The court of appeals ignored the fact that the Petitioner has affidavits from postal employees that showed that the Petitioner had been subjected to continued physical and verbal assaults and retaliation from supervisors in the Tallahassee post office.

2. The court of appeals did not address the Petitioner's arguments concerning futility of further EEOC complaints as the EEOC had not responded within the statutorily required timeframe.

3. The court of appeals ignored the Petitioner's affidavits and evidence that showed discriminatory and disparate treatment when supervisors ordered postal carriers to forge Petitioner's signature and withhold mail until such time that Petitioner could not possibly

   return documents required by the supervisors regarding FMLA leave.

4. Neither the District Court, nor the Court of Appeals addressed the ongoing FMLA violations regarding recertification of absences for the same illness.

5. Neither court addressed the Petitioner's responsibilities under duress, when he was told by a supervisor "If you file [an EEOC complaint] again, I'll blow your head off". On another occasion Petitioner was told that if he ever called the police to the post office again he would "wake up dead." Petitioner had filed a police report and a report with the Inspector General's Office concerning violence in the postal workplace. This threat from a superior is certainly definition of a hostile work environment, and one in which futility is shown with regard to filing another complaint.

6. Neither court addressed the failure of the Respondent to follow federal laws regarding recertification for the same illness in the same year.

7. Respondent took discriminatory actions against Petitioner for taking FMLA leave, refused to provide him with reasonable accommodations when he returned, and knowing his mental and emotional limitations and disabilities, retaliated against him with further verbal abuse until he had to take more time off for the same illness, then used his absences to terminate him, including absences that were covered and should have been covered under the FMLA.

8. Respondent alleged that Petitioner had no reason to be trained on forklift equipment, when in fact his job was to unload 600-700 pound pallets of mail on the loading dock. Without a forklift, he was forced to use a hand-jack and eventually suffered ruptured hemorrhoids and was forced to go to the hospital. His Worker's Compensation paperwork "disappeared" and he was never compensated for his injuries. This illness and absence was also used against him in his termination.

9. Neither Court addressed the Dept. of Labor standard letter that stated they "thoroughly investigated" his FMLA claim and found that the Florida Dept. of Corrections did not violated his rights. Mr. Wills has never worked for the Dept. of Corrections therefore no investigation could have been made. A second letter, identical to the first, was given to Mr. Wills after he pointed this fact out to Respondent's legal counsel, but the second letter only corrected the employer, casting serious doubt as to whether any inquiry was ever actually made into Petitioner's allegations.

10. Mr. Wills was forced to work on machines that were dangerous and ordered out of service by the safety inspector. A subsequent African-American employee was injured on the very same machine, with serious injuries and terminated shortly after Mr. Wills was terminated. Forcing employees to work on unsafe machines is in violation of the Union contract.

11. Respondent alleges a safety talk was given concerning the machine, but there is no record of any safety talk, and two employees who

were present on the day in question, also stated that there was no safety talk given. Regardless of "safety talks" the machine was dangerous and requiring an employee to operate it can easily be construed as retaliatory in nature.

12. Neither Court addressed the failure of the EEOC as it closed prematurely, the Petitioner's case, and therefore violating his procedural due process rights. This failure to continue the process is what the Eleventh Circuit is relying upon to state that administrative remedies were not exhausted. That ruling is incorrect as futility is a defense to continuing the administrative process, and the early closure of Mr. Wills' case shows futility.

13. After Mr. Wills was taken to the hospital from work, every attempt was made to coerce the doctors into stating that he was "faking" his illness, and a supervisor attempt on several occasions to secure privileged medical information without Mr. Wills' knowledge.

14. Each allegation, taken individually, shows malice, however, taken together, these actions show retaliation, a lack of knowledge concerning regulations and laws that protect

employees in the workplace, and discrimination based upon age and disability. The supervisors involved in this case have either been sanctioned for lying or falsifying records, allowed to retire early, or are subject to other ongoing cases of discrimination based upon age, race, and disability.

15. Initially, when the Petitioner filed his case in Federal District Court, his paperwork was returned to him. He had filed naming the United States as a defendant, and under the Federal Tort Claims Act. He was forced to refile naming the Postmaster General, and restyling the case as his appeal from the final EEOC hearing. He asked several times for an attorney as he did not understand the legal nature and concepts. He was repeatedly denied legal help on this case, and the Eleventh Circuit affirmed because he did not object. He did object as evidenced by his repeated attempts to have the court appoint him counsel or list his case as needing pro bono help. His pleas fell on deaf ears.

16. Mr. Wills mental and emotional disabilities have been well documented by his medical providers, evidenced by his hospital stays and psychiatric appointments, and has been ongoing for years, made worse by the retaliatory and discriminatory treatment he has received at the Tallahassee Post Office.

17. After returning from an extended hospital stay, Mr. Wills asked for reasonable accommodations again. His first attempts were ignored, and led to his hospital stay. He had asked for a shift change where he would not be subjected to the same supervisor that had assaulted him. Instead, that supervisor was involved in almost every decision concerning Mr. Wills. He was denied the opportunity to finish his forklift training which would have allowed him to change jobs, supervisors and shifts, as well as be promoted into another job description.

18. The courts appear to address the requests as only discrimination, not as reasonable accommodations. This is an inaccurate description as changing jobs, shifts, cutting back on hours, or transferring are all considered reasonable accommodations under the Rehabilitation Act and the FMLA.

19. The first legal counsel for the Respondent admitted to the Petitioner that he felt his witness, Mr. Hightower, had not been truthful under oath during his deposition. However, counsel used Mr. Hightower's deposition to discredit the Petitioner, and did not reveal to the District court magistrate that the testimony was presumed false.

REASONS FOR GRANTING THE WRIT

Mr. Wills' case does not just affect him. It affects every disabled worker in the federal government workforce. This Court has previously ruled that federal employees have no cause of action concerning gross retaliation or discrimination concerning the FMLA. It is unconscionable to think that federal government employees are not given the same rights as every other employee in this country. Congress has recently struck down ongoing discrimination by passing the Lilly Ledbetter Fair Pay Act, and now the Petitioner brings before this Court, another example of discrimination that must be addressed. Congress has mandated fairness be used when dealing with disabled employees. The Americans with Disabilities Act, the Family Medical Leave Act, the Rehabilitation Act, all deal with how chronic and acute illnesses should be dealt with in the workplace. Discrimination is not to be tolerated. Nowhere in these federal laws does it state that federal

employees are allowed to be degraded, humiliated, terminated, or have their lives threatened based upon their real or perceived disabilities.

Perhaps the problem is that Mr. Wills is pro se. Pro se plaintiffs are not always given the same deference as attorneys, and their arguments perhaps are not given the judicial weight that they should. The fact that the Respondent was allowed summary judgment when counsel did not follow the rules of civil procedure, is only one example in this case that points to problems within the judiciary.

This case appears to conflict with this Court's decision in Quitto v. Bay Colony Golf Club, Inc., 2007 U.S. Dist. LEXIS 48509 (S.D. Fla. 2007) where this Court held that an employee is entitled to explain any discrepancies in the record. Mr. Wills attempted to explain his answer to counsel's question during deposition. Counsel asked if Petitioner was disabled; could he walk, talk, bathe? The answer given was that he was not disabled by that definition. In fact, Petitioner was unaware of what constituted a disability, especially concerning mental illness. He has always stated that his disability has interfered with work and personal relationships, and his ability to care for himself and his property, due to severe depression and anxiety as well as the side effects of the medication taken for his disorders. Access to the courts is not only getting a case through the front door; it also encompasses the respect and dignity afforded each

litigant whether or not they are represented by counsel, helped by inmate law clerks, or representing themselves to the best of their ability.

I respect this Court and its opinions, but on behalf of disabled employees in this country, we want to work, we want to be treated with respect, and we want to live with the dignity that others in the workplace already have. We want this Honorable Court to protect us from supervisors and employers that want to only get rid of us, no matter what the cost to the disabled workers and the employers we work for. It is reprehensible that the federal government and the judiciary have seen to ignore equal protection for federal employees, allowing unscrupulous supervisors to prey on those seen as different.

I. Federal Employees have the right to be free from physical and verbal assault from supervisors in the workplace, and they have the right to be free from continued harassment on the job. Employees also have the right to be granted reasonable accommodations, as outlined in the Rehabilitation Act and the Americans With Disabilities Act. When an employer has actual and constructive knowledge of an employee's disability, and the employee has requested minor accommodations, the employer is deemed to have notice, and at that point, must provide the accommodations if it is not a hardship, as outlined in the

Rehabilitation Act and the ADA. The rulings of the lower courts in this case ignore this fact, and are contrary to the exact language in the Rehabilitation Act. The Court of Appeals and the District Court's ruling appear to conflict with this Court's rulings in Shiring v. Runyon, 90 F.3d 827, 831 (3d Cir. Pa. 1996); Bragdon v. Abbott, 524 U.S. 624 (U.S. 1998).

II. Employees who are eligible for the Family Medical Leave Act are protected from disciplinary procedures stemming from their absences. The District Court and the Court of Appeals have decided this case by using the Petitioners dates of approved FMLA leave, and dates where his leave should have been approved as outlined in the FMLA, to validate his dismissal from federal employment. Congress sought to protect employees and their jobs during periods of chronic or acute illness to the employee and his or her family. To state that the Petitioner's dates of absence constitute a valid reason for dismissal, violates both the spirit and letter of the FMLA, and leaves open the possibility for other employees to be harassed and dismissed after years of loyal service, because of illness. It further allows employers to dismiss employees who have chronic illness under the guise of lateness or absence without regard to their protected rights under several federal laws. A ruling from this

Court is needed to direct lower courts and employers to their rights and responsibilities concerning employees with illnesses.

III. Neither court below addressed the validity of the union contract, and the violation of that contract in determining whether the Petitioner was wrongfully terminated. A ruling is needed from this Court to direct the lower courts in weight given to the contract, where the employee is a party and has relied upon that contract. Employment contracts afford employees protection in addition to federal laws in the workplace. By remaining silent on these critical points, the lower courts' rulings in this case, ignore protection under contract law, and do not resolve whether the contract, EEOC, or federal laws are given the greater weight in determining a federal employee's rights. This Court has heard cases that involve union contracts and FMLA alleged violations in Ragsdale v. Wolverine World Wide, Inc., 535 U.S. 81 (U.S. 2002).This appears to conflict with the Seventh Circuit in Bhd. of Maint. of Way Emples. v. CSX Transp., Inc., 2005 U.S. Dist. LEXIS 37950 (N.D. Ill. Dec. 28, 2005)

I. THE COURT OF APPEALS DID NOT ADDRESS ALL ISSUES ON APPEAL, INCLUDING THE DISCREPANCY INVOLVING THE FEDERAL RULES OF CIVIL PROCEDURE WHEN THE DEFENDANT WAS GRANTED SUMMARY JUDGMENT

Mr. Wills filed a motion for partial summary judgment regarding the negligent hiring and retention of Willie Hightower on October 16, 2007. Summary judgment is proper when there are no material facts in dispute. Celotex Corp. v. Catrett, 477 U.S. 317,323, 106 S.Ct 2548, 2554, 91 L.Ed. 2d 265 (1986), See also Hickson Corp. v. Northern Crossam Co. Inc., 357 F. 3d 1256 1260 (11th Cir. 2004)

Mr. Wills' motion for partial summary judgment was not challenged by the Respondent, therefore there was no material fact in dispute. Rule 56(a) of the Federal rules of Civil Procedure states that "a claimant may 'at any time after the expiration of 20 days from the commencement of the action or *after service of a motion for summary judgment by the adverse party*, move with or without supporting affidavits for summary judgment in the party's favor upon all or any part thereof."

The Respondent's failure to deny a claim in plain language and with specificity, or the failure to raise a defense to that claim, results in the claim being admitted against him. "A party shall state in short and plain terms the party's defenses to ***each claim*** asserted, and shall admit or deny the averments upon which the adverse party relies." Rule 8(b) Fed. R. Civ. P.

"Furthermore, all affirmative defenses must be pled as such, including statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense.: Rule 8(c) Fed. R. Civ. P.

The Respondent's responsive pleading was a motion for summary judgment, therefore anything not denied is therefore deemed admitted. The District Court and the Eleventh Circuit did not address this even though it was well pled by the Petitioner throughout this case.

The Federal Rules of Civil Procedure state that "The United States, an agency of the United States, or an officer or employee of the United States sued in an official capacity, ***shall*** serve an answer to the complaint or cross-claim- or a reply to a counterclaim, within 60 days after the United States attorney is served with the pleading asserting the claim." Fed. R. Civ. Pro. 12(a)(3)(A). In this case, the Respondent did not file any answer within the 60 day time limit, therefore partial summary judgment for the Plaintiff/Petitioner would have been proper. It is an abuse of discretion to ignore the federal rules as it pertains to the federal government. Furthermore, the Defendant/Respondent's possible defenses, including
time barred, or that the claim can only be plead under the Federal Tort Claims Act, should be deemed "not preserved". Since the Respondent did not make any

defense to the claim of negligent retention/hiring, the Plaintiff/Petitioner should have been able to secure summary judgment on this claim.

The Respondent in this case did not file a motion to dismiss, but one for summary judgment, therefore time is not tolled, and his time to answer the complaint and assert defenses had passed. The District court's ruling is contrary to several rules of practice. See 2 Moore's Federal Practice §8.09[1] @ 8-44.1 ("Failure to deny an averment in a pleading to which a responsive pleading is required, other than those as to amount of damages, is deemed an admission." See also Sellars v. Nat'l Bank, 141 Fla.784 (Fla. 1940), holding "Defendants failed, in the sixth paragraph of their answer, to specifically deny the allegations of the sixth paragraph of the bill of complaint, or to state that defendants were without knowledge as to the same." See also Clermont-Mineola Country Club v. Loblaw, 106 Fla. 122,143 So.129; Exchange National Bank of Tampa v. Clark-Ray Johnson Co., 95 Fla.734,116 So. 647; Citizens Bank and Trust Co. v. Grey, 100 Fla. 958,130 So. 274.

Additionally, the U.S. District Court in Indiana has ruled that a document cannot speak for itself regarding denial. See Ind. Reg'l Council of Carpenters Pension Trust Fund v. Fid. & Deposit Co. of Md., 2006 U.S. Dist. LEXIS 82715 (D. Indiana 2006), holding "courts have expressly held that a response indicating that a document 'speaks for itself' is insufficient under the federal rules."

The fact that the government's attorney "thought he was entitled to something" does not negate the need to properly affirm or deny a cause of action.

II. RESPONDENTS RETAILIATED AGAINST THE PETITIONER AND USED FRAUDULENT MEANS TO DEPRIVE HIM OF HIS PROTECTED RIGHTS UNDER THE FMLA, THE REHABILITATION ACT, AND THE AMERICANS WITH DISABILITIES ACT.

The Petitioner presented sworn statements from postal mail carriers and other postal workers showing that the Respondent, through his employees, falsified documents showing the Petitioner had received certified mail in a timely manner. This mail supposedly contained requests for FMLA documents that the Petitioner was to have filled in by his doctor, and return by a certain date. On several occasions, the regular mail carrier was ordered by his supervisor, to destroy or withhold the mail until the date had passed. This blatant disregard for the Petitioner's rights violates federal laws regarding the delivery of mail, shows fraudulent ongoing practices within the Postal Service, and is certainly proof of malice and discrimination against the Petitioner due to his disability.

The Respondent's employees also stated, under oath, that the supervisors were unaware of Mr. Wills' disability. This is an untruth, as the same supervisors involved had copies of all Mr. Wills' medical

documentation, and had even requested that his doctor sign a statement that he was not a danger to others at work. They received this statement within the time frame, however, they still proceeded with disciplinary action against Mr. Wills concerning his covered FMLA absences.

Mr. Wills called in during the month of October, after returning from FMLA leave, because of continued harassment at work concerning his FMLA requests. Mr. Wills was able to recall with certainty who he spoke to within the eRMS system in Jacksonville, what time he called, and what he said. The supervisor who denied Wills called in, was unable to recall any information, when she called eRMS, and had no documentation to back up her allegations; however the district court gave more weight to her story than the Petitioner's, even though it should have been reviewed in the light most favorable to the Petitioner.

III. THE COURT OF APPEALS DID NOT ADDRESS THE IMPACT OF THE LILLY LEDBETTER FAIR PAY ACT OF 2009 AND CONTINUING VIOLATIONS, EVEN THOUGH THE CONTINUING VIOLATIONS DOCTRINE WAS RAISED AT THE DISTRICT COURT LEVEL.

Continuing violations of an employee's civil rights shows malice and discrimination. Congress has sought to strengthen anti-discrimination laws by adding a clause that allows for the continuing violations doctrine to

apply retrospectively. By applying this doctrine to the instant case, Mr. Wills would be entitled to have all instances of discrimination considered from the time he first filed an EEOC complaint, as each instance concerned the same set of supervisors, was similar in nature, and involved discrimination and violations of his civil rights.

IV. THE RULINGS OF BOTH THE DISTRICT AND ELEVENTH CIRCUIT ARE CONTRARY TO THE FMLA OPINION LETTERS TO EMPLOYERS CONCERNING ABSENCES AND RECERTIFICATION.

In Appendix D, opinions of the Dept. of Labor reveal what an employer should do when employees have intermittent absences, need recertification, or have a need for reasonable accommodations. These letters further reveal the Respondent's lack of understanding of FMLA employer requirements. When the Petitioner needed intermittent time off to deal with his mental and emotional illness, he did not have to complete all new paperwork.

He was still covered under FMLA and only had to let his employer know at the earliest possible moment that he was going to be absent. He called his employer, and instead of requesting him to document his illness, or get a note from his doctor, he was denied leave, which is against the FMLA rules. He was entitled to 12 weeks leave during the year, and each time he attempted to use his leave, his was denied, or disciplined, which is also against the federal rules under the FMLA.

V. NEITHER THE DISTRICT COURT NOR THE ELEVENTH CIRCUIT ADDRESSED EEOC CASE NO. 1H-321-0044-05, AND THE PREMATURE CLOSING OF THIS CASE, THUS DENYING PETITIONER DUE PROCESS.

The Petitioner promptly filed an EEOC complaint (1H321-0044-05) upon his termination from the Postal Service. He followed up with the mediation conference set up by the EEOC, but no agreement was reached. The EEOC mailed a "Notice of Right to File Individual Complaint" on August 18, 2005. Mr. Wills should have had 15 days to file his formal complaint. Instead, the EEOC closed Mr. Wills file a mere five days later, preventing him from filing a formal complaint or continue the process. Even the Respondents own version supports Mr. Wills in this instance. The only other administrative route available, was to file a postal union grievance, which Mr. Wills did, going even further and filing with the Dept. of Labor. There is reciprocity between the DOL and the EEOC, and a claim is considered filed with the EEOC when filed with DOL. Final agency action is presumed when an employee is terminated. The Department of Labor gave him a "right to sue" letter. His disability claims are addressed and preserved in the DOL complaint. His retaliation claim is presumed as it arises out of the final agency action, and actions preceding the termination. Therefore, Mr. Wills has properly exhausted all administrative remedies, and is entitled to have his case appealed and heard in Federal District Court.

The decision of both the District Court and the Eleventh Circuit seem to conflict with the holding in Zipes v. Trans World Airlines, 455 U.S. 385, 102 S. Ct. 1127, 71 L.Ed. 2d 234 (1982), holding that a right to sue letter is a statutory one, not a jurisdictional one. See also, Perdue v. Roy Stone Transfer Corp., 690 F.2d 1091 (4th Cir. 1982).

Other circuits have held that plaintiffs who had attempted to obtain right to sue letters were not barred from bringing ADA claims. See Perepchuk v. Friendly's Ice Cream Corp., 2000, U.S. District LEXIS 2019, 2000 WL 1372876, (M.D. Pa.) ("failure to obtain right-to-suc letter can be excused if the Plaintiff made some effort to procure a right to sue letter or... raised the failure to issue the letter with the EEOC prior to filing the court action"). See also Dollinger v. State Ins. Fund, 44 F. Supp. 2d 467,474 (N.D.N.Y 1999); Canty v. Wackenhut Corr. Corp., 255 F. Supp. 2d 113,117 (E.D.N.Y. 2003).

VI.MR. WILLS TORT CLAIMS WERE PROPERLY PLED AND COVERED UNDER TITLE VII.

Mr. Wills' claims of intentional and negligent infliction of emotional distress are a direct result of adverse employment action and were of a highly personal nature. It does not get any more personal than having a supervisor threaten to "blow your head off" for engaging

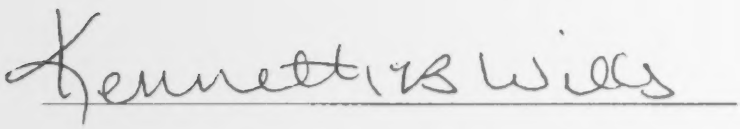
in a statutorily protected activity. In Brown v. General Serv. Admin., 425 U.S. 820, 835, 96 S.Ct. 1961, 48 L. Ed. 2d 402 (1976), this Court held that Title VII provides "an exclusive judicial remedy for claims of discrimination in federal employment." Id at 835, 96 S. Ct. 1961. However, since Brown, "A number of courts have distinguished between discrimination claims and other claims which, although arising out of the same set of facts and circumstances, seek to remedy injuries other than workplace discrimination." Wallace v. Henderson, 138 F. Supp 2d 980, S.D. Ohio, 2000. See also, Brunetti v. Rubin, 999 F. Supp. 1408 (D. Col. 1998), discussing other courts determination that "§717 does not subsume or preempt all claims that rely on the same set of operative facts"; Stewart v. Thomas, 538 F. Supp. 891, 893 (D.D.C. 1982) holding that an employee correctly sued under Title VII and common law theories of battery, assault, and intentional infliction of emotional distress. The Stewart court held that Brown did not prohibit federal employees who allege employment discrimination from suing on any cause of action arising from the same facts." The Stewart court dismissed the federal employee's claim of intentional infliction of emotional distress to the extent the federal employee's emotional injuries resulted from the stressful work situation created by the defendant's discrimination, but to the extent that her emotional injuries were a ***direct result of her supervisor's assaultive behavior,*** allowed the claim.

Therefore, Stewart stands for the proposition that a federal employee who has brought a Title VII claim is not precluded from suing for a "highly personal violation" that goes beyond discrimination. Id at 893. See also, Brock v. U.S. 64 F.3d 1421 (9th cir. 1995), holding, "Title VII is not the exclusive remedy for federal employees who suffer 'highly personal' wrongs, such as defamation,...and physical abuse.. when the harms suffered involve something more than discrimination, the victim can bring a claim."

CONCLUSION

For the reasons stated above, this writ should be granted and set down for argument.

Respectfully submitted this 7th day of October, 2009



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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 08-12234
Non- Argument Calendar

District Court Docket No.
05-00381-CV-WS-WCS

KENNETH B. WILLS,

Plaintiff-Appellant,

versus

POSTMASTER GENERAL, Defendant-Appellee,

Appeal from the United States District Court
For the Northern District of Florida

JUDGMENT

It is hereby ordered, adjudged, and decreed that the attached opinion included herein by reference, is entered as the judgment of this Court.

Entered: November 21, 2008
For The Court: Thomas K. Kahn
By:Clark, Djuanna H.

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 08 – 12234

Non-Argument Calendar

D.C. Docket No. 05- 00381 – CV-4-WS-WCS

KENNETH B. WILLS

Plaintiff-Appellant,

versus

POSTMASTER GENERAL,

Defendant-Appellee.

Appeal from the United States District Court

for the Northern District of Florida

(November 21, 2008)

Before ANDERSON, BARKETT and MARCUS, Circuit Judges.

PER CURIAM:

Kenneth Wills, an African-American male, appeals the district court's summary judgment in favor of his former employer, the United States Postal Service ("USPS"), and denial of his partial motion for summary judgment on his pro se employment discrimination lawsuit alleging disparate treatment and harassment based on race, and retaliation, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C.§ 2000e, et, seq. ("Title VII"); discrimination in violation of the Rehabilitation Act, 29 U.S.C.§ 701, et seq.; and negligent retention of an employee by his federal employer.[1]

"W[e] review de novo a district court's grant of summary judgment, applying the same legal standards as the district." Chapman v. AI Transport, 229 F.3d 1012, 1023 (11th Cir. 2000) (en banc). The moving party is entitled to summary judgment if "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). If the non-moving party bears the ultimate burden of proof regarding the claim at issue in the motion, that party, in response to the motion, must go beyond the pleadings and establish, through competent evidence, that there truly is a genuine,

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[1] In addition to appealing the summary judgment rulings, Wills argues that the district court erred in denying his motions for appointment of counsel. Even if this claim were not waived by Will's failure to object to the denials below, this Court reviews the denial of a motion to appoint counsel only for abuse of discretion, United States v. Berger, 375 F.3d 1223, 1226 (11th Cir. 2004). Under 28 U.S.C. §1915(e)(1), a court may appoint counsel for indigent plaintiffs, but only in exceptional circumstances. Bass v. Perrin, 170 F.3d 1312, 1320 (11th Cir. 1999). Here, the district court did not abuse is discretion in finding that the facts and legal issues relating to Wills's Title VII, Rehabilitation Act, and tort claims were not so novel or complex as to constitute exceptional circumstances warranting appointment of counsel.

material issue to be tried. Celotex Corp. v. Catrett, 477 U.S. 317, 324, (1986).

Wills argues that the USPS violated Title VII, which prohibits employers from discriminating on the basis of race, see 42 U.S.C. § 2000e-2(a), when it suspended Wills in 2004[2] and terminated him in 2005, and because he was subjected to racial harassment by a supervisor. Normally, before filing a Title VII action, a plaintiff must exhaust his administrative remedies by filing a charge of discrimination with the EEOC. Gregory v. Dep't of Human Res., 355 F.3d 1277, 1279 (11th Cir. 2004). A plaintiff's judicial complaint is limited by the scope of the EEOC investigation that "can reasonably be expected to grow out of the charge of discrimination." Id. at 1280 (quoting Alexander v. Fulton County, Ga., 207 F.3d 1303, 1332 (11th Cir. 2000).

Wills did not administratively exhaust any claim that his suspension in 2004 or his termination in 2005 constituted discrimination on the basis of race. Further, because Wills's EEOC complaint did not mention any harassment except a single incident that occurred on September 23, 2003, that was the only harassment claim to be exhausted. Thus the district court did no err in barring

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[2] With respect to his suspension, Wills also argues that he was wrongfully suspended for absences that were covered by the Family and Medical Leave Act, 5 U.S.C. ___ 6381, et seq. ("FMLA"). However, since the FMLA does not provide a private cause of action for federal government employees against their government employers, see id., the district court was correct to analyze Wills's discrimination claims under only Title VII and the Rehabilitation Act.

these claims for failure to exhaust available administrative remedies.

Wills also argues that the USPS violated Title VII when it treated him differently because of his race in denying him forklift training, requiring him to work on a holiday, deny him the opportunity to work requested overtime, requiring him to work two machines simultaneously , and requiring him to operate a machine with a defective "stop" button. To establish a prima facie case of disparate treatment based on race, an employee must show that: (1) he is a member of a protected class; (2) he was subject to an adverse employment action; (3) his employer treated similarly situated employees who were not members of his class more favorably; and (4) he was qualified for the job or benefit at issue. Gillis v. Ga. Dep't of Corrections, 400 F.3d 883, 887 (11th Cir. 2005).

Here, Wills provided numerous examples of situations in which he felt he was mistreated, but he failed to show that he was treated differently because of his race. Indeed, in many instances, white employees were subject to the same treatment. Thus, because Wills did not show that he was treated differently than any other similarly situated employees, the USPS was entitled to summary judgment on his Title VII disparate treatment claims.

Wills also argues that he was subject to racial harassment by the USPS in violation of Title VII. To establish a hostile work

environment under Title VII, an employee must demonstrate that: (1) he belongs to a protected group; (2) he has been subjected to unwelcome harassment; (3) the harassment was based on the protected characteristic; (4) the harassment was sufficiently severe or pervasive to alter the terms and conditions of employment and thus create a discriminatorily abusive work environment; and (5) the employer is responsible for that environment under a theory of either direct or vicarious liability. Miller v. Kenworth of Dothan, Inc., 277 F.3d 1269, 1275 (11th Cir. 2002).

As discussed above, Wills exhausted only one claim of racial harassment – that on September 23, 2003, a supervisor was hostile to him. He did not show that this single incident was tied to his race, nor that it was sufficiently severe or pervasive as to alter the terms and conditions of his employment. Accordingly, the district court did not err by granting summary judgment on this issue.

Wills also argues that the USPS retaliated against him, in violation of Title VII in response to his filing of a complaint with the EEOC. To state a claim for retaliation under Title VII, 42 U.S.C. § 2000e-3(a), an employee must prove that "he engaged in statutorily protected activity, he suffered a materially adverse action, and there was some causal relation between the two events." Goldsmith v. Bagby Elevator Co., Inc., 513 F.3d 1261, 1277 (11th Cir. 2008) (citing Burlington N. & Santa Fe. Ry. Co. v. White, 548 U.S. 53 (2006)).

The filing on an EEOC charge constitutes a "statutorily protected activity." See id. (applying this analysis in a case where the employee was fired after filing a charge with the EEOC).

"After the plaintiff has established the elements of a claim, the employer has an opportunity to articulate a legitimate, non-retaliatory reason for the challenged employment action as an affirmative defense to liability." Id. If the employer does so, the plaintiff may prevail only by "demonstrat[ing] that the proffered reason was not the true reason for the employment decision...by persuading the court that a discriminatory reason more likely motivated the employer or...by showing that the employer's proffered explanation is unworthy of credence." Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 256 (1981).

Here, the USPS offered Will's excessive absences as a legitimate, non-discriminatory explanation for its actions, and, therefore, Wills was required to demonstrate that that reason was pretextual. He did not present any evidence to show that the USPS didn't actually believe that its leave calculations and records were correct or that the true reason for suspending Wills was in retaliation for his EEOC charge. Accordingly, summary judgment for the USPS was proper.

Wills also argues that he was discriminated against because of mental and emotional disabilities in violation of the

Rehabilitation Act. To qualify as disabled, a plaintiff must have an impairment that "substantially limits one or more major life activities." 29 U.S.C. §705(9)(B). Although the record showed that Wills had mental impairments, it did not show that he was substantially limited in any major life activity. Thus, the USPS was entitled to summary judgment on Will's Rehabilitation Act claims.

Wills also brings a claim against the USPS arguing that it negligently retained Wills's supervisor. The district court properly found that this tort claim could only be brought under Federal Tort Claims Act, see 28 U.S.C. §1346(b), 28 U.S.C. § 2671 et seq. ("FTCA"), and that under the FTCA Wills had named the wrong defendant, the USPS, rather than the United States. Even if this flaw had not waived Wills's tort claim, it was still properly dismissed for lack of exhaustion.

A federal court has no subject matter jurisdiction over a suit against the United States unless the plaintiff has first filed an administrative claim with the concerned agency pursuant to §2675(a) that contains a "claim for money damages in a sum certain." Dalrymple v. United States, 460 F.3d 1318, 1324 (11th Cir. 2006). "When the sum certain is omitted, the administrative claim fails to meet the statutory prerequisite to maintaining a suit against the government, and leaves the district court without jurisdiction to

hear the case." Suarez v. United States, 22 F.3d 1064, 1065 (11th Cir. 1994). A9

Here, the record shows that Wills did not comply with the FTCA's exhaustion requirements. Specifically, he never presented to the USPS an administrative claim stating a sum certain. Accordingly, his claim of negligent retention was precluded under the FTCA.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 08-12234-HH

KENNETH B. WILLS,

Plaintiff-Appellant,

verus.

POSTMASTER GENERAL,

Defendant- Appellee.

On Appeal from the United States District Court for the Northern District of Florida

Before: BARKETT, MARCUS, and ANDERSON, Circuit Judges.

PER CURIAM:

The petition for rehearing are denied and no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (rule 35, Federal Rules of Appellate Procedure), the Petition for rehearing En Banc is denied.

ENTERED FOR THE COURT:

/s/ Rosemary Barkett
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA TALLAHASSEE DIVISION

KENNETH B. WILLS,

Plaintiff,

Vs. **Case No. 4:05cv381-W/WCS**

JOHN E. POTTER, POSTMASTER GENERAL

Defendant.

_____/

REPORT AND RECOMMENDATION

Pending in this case is Defendant's motion for summary judgment. Doc. 60. Plaintiff, who is *pro se* in this Title VII case, was advised of his burden in opposing summary Judgement. Doc. 61. Plaintiff's opposition to Defendant's summery judgement was filed on October 12, 2007. Doc. 68.

Thereafter, Plaintiff filed his own motion for partial summary judgment as to one claim, "negligent retention of Willie Hightower as a supervisor over Plaintiff," doc. 62, and then a revised motion for partial summary judgement as to this same claim. Doc. 70. Defendant filed a response to Plaintiff's motion on

October 5, 2007, doc 65, and thereafter, filed a supplemental response, doc. 69. Plaintiff was given leave to supplement his motion for partial summary judgement, doc. 67, and he did so on October 17, 2007. Doc 70.

Allegations of the Second Amended Complaint, doc. 56

Plaintiff alleged that he had been employed by Defendant, the United States Postal Service, office in Tallahassee, Florida, from October of 1988 through April 15, 2005. Doc. 56, p. 3. He alleges claims arising under Title VII and the Americans with Disabilities Act (ADA). *Id.*, p. 4. Plaintiff alleges failure to accommodate his disability, harassment, abuse, retaliation, termination, and negligent retention of his supervisor. *Id.*

Plaintiff alleged harassment by a supervisor, Willie Hightower, on May 5, 1995, and July 30, 1995. *Id.*, at 4.

Plaintiff alleged that he was suspended for unauthorized absences in August , 2003, even though Ms. Dickens knew Plaintiff had been approved for leave under the Family and Medical Leave Act (FMLA). *Id.*, p. 5.

Plaintiff claimed he was denied forklift training and overtime. *Id.*, at 5. He further alleged that supervisors knew of his disability but did nothing to help him. *Id.*

Plaintiff also alleged he was directed to work on two machines at once by the acting supervisor and then, when Plaintiff complained by filing an EEO compliant, the acting supervisor retaliated against him. *Id.,* at 6.

Plaintiff alleged that there was a conspiracy to terminate him in retaliation for his complaints. *Id.*

He further alleged he was "not given preference in line with [his] seniority on overtime, holidays off or promotion." *Id.*

Finally, Plaintiff alleged state law claims of intentional and negligent infliction of emotional distress. *Id.*, p. 8.

Defendant's Arguments

Defendant contends there is no evidence to show that Plaintiff is "disabled" under the Act or the Plaintiff ever requested an accommodation for a disability. Doc. 60. Further, Defendant asserts that Plaintiff will be unable to demonstrate a *prima facie* case of discrimination and, moreover, there were "compelling legitimate non-discriminatory business reasons for each of the

actions taken." *Id.* Defendant contends some of Plaintiff's claims must be dismissed because he "failed to exhaust administrative remedies." *Id.*

Legal standards governing a motion for summary judgement

On a motion for summary judgement Defendant initial has the burden to demonstrate an absence of evidence to support the nonmoving party's case. Celotex Corporation v. Catreet, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 2553-54, 91 L. Ed. 2d 265 (1986). If accomplished, the burden shifts to Plaintiff to come forward with evidentiary material demonstrating a genuine issue of material for trial. *Id.* An is of fact is "material" if it could affect the outcome of the case. Hickson Corp. v. Northern Crossarm Co., Inc., 357 F.3d 1256, 1259 (11th Cir. 2004) (citations omitted)' Plaintiff must show more than the existence of a "metaphysical doubt" regarding the material facts, Matsushita Electric Industrial Co., LTD. V. Zenith Radio Corporation, 475 U.S. 574, 586, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986), and a "Scintilla" of evidence is insufficient. The court must decide "whether the evidence presents a sufficient disagreement to

require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Hickson Corp., 357 F.3d at 1260, *quoting* Anderson v. Liberty Lobby, 477 U.S. 242, 252, 106 S. Ct. 2505, 2505, 91 L. Ed. 2d 202 (1986). All reasonable inferences must be resolved in the light most favorable to the nonmoving party. Watkins v. Ford Motor Co., 190 F.3d 1213, 1216 (11th Cir. 1999).

"Rule 45(e) . . . requires the nonmoving party to go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.' " Oewn v. Willie, 117 F.3d 1235, 1236 (11th Cir. 1997), *cert. Denied* 522 U.S. 1126 (1998), *quoting* Celotex, 477 U.S. at 234, 106 S Ct. at 2553 (quoting Fed. R. Civ. P. 56©, (e)). The nonmoving party needs not produce evidence in a form that would be admissible as Rule 56(e) permits opposition to a summary judgement motion by any of the kinds of evidentiary materials listed in Rule 56(c). Owen v. Willie, 117 F.3d at 1236; Celebrex, 477 U.SD. at 324, 106 S. Ct. at 2553.

Plaintiff may move for summary judgement, with or without supporting affidavits, upon all or any part of his or her claim. Fed. R. Cir. P. 56(a). Summary judgement shall be granted in favor of Plaintiff "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgement as a matter of law." Fed. R. Civ. P. 56(c). "A claiment is entitled to summary judgement only when no genuine issue of material fact exists, the papers on the motion demonstrate the right to relief, and every one of the defenses asserted legally are insufficient." 10B CHARLES A. WRIGHT, ARTHUR R. MILLER, MARY K. KANE, FEDERAL PRACTICE AND PROCEDURE § 2734 (1983). Since Plaintiff (as the party with the burden of proof) has a heavier burden on summary judgement, Defendants' motions for summary judgement will be considered first.

The relevant Rule 56(e) evidence

Defendant's evidence

Forklift training

At all times relevant to Plaintiff's allegations, Plaintiff was employed as a Mail Processing Machine Operator. Doc. 60, p. 2. *See also* doc. 60-2 on the electronic case filing docket (ECF), p. 2 (ex. A).[1]

In March 1995, Plaintiff was transferred and reassigned to Tallahassee as a part time, flexible position employee, as a mailhandler. Doc. 60-30, pp. 1 and 3 (ex. CC); *see also* doc. 60-30, p. 3. On April 3, 1995, Plaintiff was changed to a "fulltime mailhandler" position, filling "residual vacancy #6556682." Doc. 60-30, p. 4 (ex. CC). The copy of that notice shows that Plaintiff's assignment, effective on April15, 1995, as: "principal assignment area: Mark II, outgoing, and any other area the needs of the service may require." Doc. 60-30, p. 5 (ex. CC).

Plaintiff's duties as a Mail Processing Machine Operator included the operation of two machines: an Advanced Facer Canceller (an "AFC"), and a Micro Mark mail processing machine. Doc. 60, p. 2; doc. 60-2, p. 3 (ex. A). Plaintiff was one of three such

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[1] References are to the paper copy and page number, followed by a reference (in parenthesis) to the corresponding documentation and page in the electronic docket for documents on the electronic docket. Both citations are referenced as a *pro se* litigant will not have ready access to the court's electronic docket.

operators in his work unit. Doc. 60, p. 2; doc. 60-4 (*see* exhibits A, B, and C). Both of the other operators had more seniority that Plaintiff. Doc. 60, p. 2; exhibits FF and II.

Plaintiff had requested that he be trained to operate a forklift, but his request was denied because those skills were not necessary for Plaintiff to perform his duties as a mail processing machine operator "with principal assignment" on the Mark II cancellation machine. Doc. 60, p. 2; doc. 60-3, p. 6 (ex. B); docs. 60-4 and 60-33 (exs. C, FF). In other words, Plaintiff's job was "a Mail Processing Machine Operator" although it could generally be said that "Mailhandler" was the "craft he was assigned to." Doc. 60-33, p. 1 (ex. FF). Plaintiff was not a ""relief tech," although during his first 30 days of employment, when he was "a Part Time Flexible 'PTF' Mailhandler," he might have been needed and worked on the dock during that time. *Id.*, at 1-2. As a mail processing machine operator, his full-time position, Plaintiff did not need forklift training because he might be needed to break down mail, but would never have been needed to operate a forklift as "other" duties assigned. Doc. 60-31, p. 2 (ex. DD; see also ex. FF, doc. 60-33, p. 2). Neither of the other two machine operators

in Plaintiff's work unit with the same occupational code (Craig Clark and Kenneth Young) were provided forklift training. Doc. 60, p. 3; doc. 60-3, p. 6 (ex. B); doc. 60-33, p. 1 (ex. FF). Some mailhandler jobs do require forklift training, and when that is so, "their bid awards so specify if that is the case," but Plaintiff was not assigned to those jobs. Doc. 60-33, p. 1 (ex. FF). There was simply "no reason to train" Plaintiff on the forklift since his "duty assignment required him to . . . operate postal cancellation machines." Doc. 60-6, p. 1 (ex. E). Plaintiff received a formal memorandum dated April 30, 2003, explaining the basis for the repeated denials of his numerous requests for forklift training. Doc. 60-30, p. 6 (ex. CC); doc. 60-32 (ex..EE). The particularly relevant portions of that memorandum state:

> On April 30, 2003, you asked me what you had to do in order to get forklift training. You said you needed forklift training to be able to unload the trucks when you worked overtime at Christmas.
>
> You have repeatedly asked me this same question since 1996. My response will have to remain the same as always: It is true that in January 1996, you were started on the classroom portion of Powered Industrial Truck Training which includes forklift. However, you never received on-the-job (practical)

> training and vehicle familiarization and certification in order to be considered a certified PIT operator.
>
> The reason that your training was stopped was because it was verified that since April 15, 1995 you have held job 6556682, Mail Processing Machine Operator. Your principal assignment area is Mark II, outgoing, and any other area the needs of the service my require. No where on your job description does it require forklift or Powerful Industrial Truck operation. PIT/forklift training was started in error by management and was stopped by management when they realized this training was not a requirement for your job and it was not required by the needs of the service. Tallahassee does have mailhandlers jobs which require PIT equipment operation but your job 6556682 does not have that requirement.

Doc. 60-30, p. 6 (ex. CC).

Plaintiff alleged in his complaint four other persons who were provided forklift training: Mr. Shiver, Mr. Jamison, Mr. Rawls, and Ms. Scurry. Defendant had produced evidence showing that two of those four persons (Jamison and Scurry) had a different occupation code from Plaintiff and their positions required them to move mail around "on the workroom floor and/or dock." Doc. 60-3, p. 6 (ex. B)> The other two persons (Shiver and Rawls) had an occupational code as a mail handler group leader which would also make them "responsible for moving the mail

around on the floor and/or dock." *Id.* The other Mark II operators who had the *same* occupational code as Plaintiff (234045XX) were Craig Clark, a white male, and Kenneth Young, a Black male. Doc. 60-3, p. 6 (ex. B); doc. 60-31, p. 2 (ex. DD); *see also* doc. 60-32 (ex. EE). Neither of those employees received forklift training either as they "would not have any need to operate a forklift." Doc. 60-3, p. 6 (ex. B, p. 6); doc. 60-31, p. 2 (ex. DD); *see also* doc. 60-32, p. 1 (ex. EE). The decision to deny forklift training was the "consensus opinion of all Tour 3 supervisors." Doc. 60-9, p. 2 (ex. H).

Holiday work

Plaintiff was required to work on a holiday, Saturday, August 30, 2003, (because Labor Day fell on a Monday), but another "junior employee," Connie Maciora, was not required to do so. Doc 60, p. 3; docs. 60-4, 60-8, p. 4, doc. 60-10, p.1 (exs. E, G, H). Notably, Plaintiff had been "absent from work from approximately August 5, 2003 until August 27, 2003." Doc. 60-9, p. 1 (ex. H). Ms. Maciora requested leave for August 30th on August 11, 2003, while Plaintiff was absent. Doc. 60-9, p. 1 (ex. H).

Plaintiff was forced to work on August 30, 2003, because there were no other volunteers to work overtime. Doc. 60-6, p. 2; (ex. E). An employee who was senior to Plaintiff, Mr. Bagot, was also "on holiday" and because Plaintiff was junior to him, Plaintiff was required to work even though he was not scheduled to work on the holiday, however, as "Mail Handler Johnny Fillmore was also scheduled to work." Doc. 60-8, p. 4 (ex. G). To fulfil the duty to ensure the efficient delivery of mail, there will be "times when employees are required to work on their holiday." Doc. 60-9, p. 1 (ex. H).

Plaintiff received "holiday pay" for working that day, "which is calculated at double his normal pay." Doc. 60-9, p. 2 (ex. H).

Denied Overtime

Plaintiff was *not* permitted to work overtime during September 15-18, 2003, although a "junior employee," Geneva Scurry, was allowed to work overtime. Doc. 60, p. 3. Ms. Scurry was a Mail Handler, not in Plaintiff's position as Machine Operator, and worked overtime to perform the duties of another Mail Handler who was ill. Doc. 60, p. 3; docs. 60-4, p. 1, doc. 60-8,

p. 5 (exs. C, G). Furthermore, Ms. Scurry was assigned to work overtime in accordance with the USPS National Contract. Doc. 60, p. 4; doc. 60-3, p. 7 (ex. B). That contract provides, among other things, that requirements if a qualified full-time employee is not on the overtime desired list or the volunteer lists for overtime, overtime "shall be on a rotating basis with the first opportunity assigned to the junior employee." Doc. 60-3, p. 7 (ex. B) (emphasis in the original).[2] Neither Plaintiff nor Scurry signed the overtime desired list. *Id*, p. 6. Ms. Scurry was the junior employee and, moreover, Plaintiff's request for overtime came prior to his regular reporting time and his services were not needed at that time. Doc. 60, p. 4; docs. 60-3, p. 7, 60-8, p. 5, and 60-9, p. 2 (exs. B, G, and H). This occurred because Plaintiff did not report to work until 4:00 p.m., and no overtime was needed prior to 4:00 p.m.; Ms.Scurry was scheduled to work at 6:00 p.m.. and she was asked to work two hours of overtime beginning at 4:00 p.m. Doc 60-9, p. 2 (ex. H).

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[2] That contract also provide states that "overtime work shall be scheduled among qualified full time regular employees doing similar work in the work location where the employees regularly work . . ." Doc. 60-3, p. 7 (ex B). Furthermore, full time employees are required to sign an "overtime desired" list. *Id.*

It is represented that another Machine Operator with more seniority than Plaintiff, Kenny Young, was assigned to work overtime as a Machine Operator instead of Plaintiff. Doc. 60, p. 4. Mr. Young, however, had volunteered in advance by signing the overtime desired list, but Plaintiff did not sign that list. Doc. 60, p. 4; doc. 60-3, p. 64 (ex. B). Those persons were Mr. Craig Clark (a Caucasian male) and Mr. Kenneth Young (an African-American male); neither "Mr. Clark nor Mr. Young were on restricted sick leave." Doc. 60-3, p. 8 (ex. B). Plaintiff was placed on restricted sick leave status pursuant to Section 513.37 of the Employee and Labor Relations Manual because of irregular attendance. Doc. 60, p. 4; docs. 60-3, pp. 4, 28, 60-9, p. 3 (exs. B, H)> Plaintiff was issued a letter signed by his supervisor and dated July 23, 2003, which required him to comply with strict reporting requirements for future absences. Doc. 60, p. 4; doc. 60-3, p. 28 (ex. B).

Defendants have presented evidence that if an employee had an absence that could potentially be covered under the FMLA, a message was left by the employee's attendance supervisor on the FMLA coordinator's log, which would then prompt a check on the enterprise Resource Management System

(hereinafter "eRMS") to determine whether the employee met the first qualification (having worked 1,250 hours in the prior year). Doc. 60-3, 60-3, p. 2 (ex. B). If so, a "New Call" letter would be sent to the employee explaining the qualifying condition under the FMLA and giving the employee a form WH380 to take to his health care provider. Doc. 60-3, p. 2 (ex. B). The letter would direct the employee to respond within 15 days from receipt of the "New Call" letter, and advise that he could request, if there was good reason to do so, an extension of time to turn in the paperwork. Doc. 60-3, p. 2 (ex. B).

> For an absence to be covered by FMLA, [an employee] must have been employed by the Postal Service for a total of at least 1 year and must have worked a minimum of 1,250 hours during the 12-month period before the date [the] absence begins. Once eligible for a given condition, if[the employee's] work hours subsequently fall below 1,250 during the postal leave you, [the employee's] eligibility for FMLA protected absences for that condition remains in effect for the duration of the leave year. However, if a second and unrelated condition arises in the leave year, [the employee] must meet the 1,250 eligibility test anew in order to obtain FMAL protected leave for that (i.e., second) reason.

Doc. 60-3, p. 10(ex. B).

On August 11, 2003, a "New Call" letter was sent by Ruth Busey to Plaintiff, and received by him, on that dame day. Doc. 60-3, p. 2 (ex. B). Plaintiff should have responded with the needed paperwork by August 26, 2003. *Id.* Due to the length and cause of Plaintiff's absence, Plaintiff had to return a medical certification and clearance form before he could report back to work. Doc. 60-3, p. 3. On August 21, 2003, Plaintiff's physician stated that Plaintiff ""could return to work on 8/26/03." *Id.* However, Ms. Busey's affidavit explains that Plaintiff still was not qualified for FMLA protection at that time because the Wh380 form had not been returned. *Id.*

On September 4, 2003, the WH380 form was received by Ms. Busey, but she said that the form was incomplete and still did not qualify [Plaintiff] for FMLA protection." Doc. 60-3, p. 3. Citied for this is a note from Ms. Busey that reasoned that the form was incomplete because the physician had not indicated the "frequency of duration" of the illness. Doc. 60-3, p. 22. The form, doc 60-3, pp. 23-24, shows that the physician had indicated that the condition was chronic (checking box 4), but in response to

question 5.c., asking for frequency and duration, said "depression may be lifelong or may resolve prior." Doc. 60-3, p. 24.

The following day, Ms. Busey sent Plaintiff "a 'CURE' letter, also known as a 'Frequency & Duration' letter" and returned the WH380 form to Plaintiff. Doc. 60, ex. B; ex. 60-3, p. 3, The WH380 was received for the second time by Ms. Busey on September 16, 2003. *Id.* She further states in her affidavit that Plaintiff's request for FMLA should have been "disapproved . . . on August 26, 2003" because the proper form was not completed and returned until later. *Id.* Also, the returned form provided that Plaintiff could return to work on August 26, 2003, and that he was "out of work" from August 5th through August 25th. Doc. 60-3, pp. 23-24.

Ms. Busey's affidavit indicates that "on several other occasions [Plaintiff] called in with an FMLA condition but never followed through and provided the paperwork." Doc. 60, ex. B; ex. 60-3, p. 3. "Therefore in those cases FMLA was denied." *Id.* As for this particular instance, Plaintiff would not have been

approved during August of 2003. *Id*, at 2-3.[3] Defendant provided a copy of the "Request for or Notification of Absence" which was submitted on August 27, 2003, for the dates of August 22nd and August 24th which clearly show Plaintiff's absence was listed as "AWOL" (absent without leave) and "disapproved" for FMLA. Doc. 60-3, p. 55 (Ex. B, p. 55).

Attendance Suspension

Another of Ms. Busey's duties as secretary to the Plant Manager was to "write Restricted sick Leave letters to employees when . . . asked to do so by their supervisors." Doc. 60, ex B; ex. 60-3, p. 4. Plaintiff "was placed on Restricted Sick Leave on July 23, 2003," which means that Plaintiff would require "to provide documentation for each instance of sick leave, which is brought about by a poor attendance record." *Id.* Being on restricted Sick Leave contains a notation that Plaintiff left the office and went home, and the memorandum was mailed to Plaintiff via certified mail. *Id., at 28-29.*

[3] Ms. Busey explains in her affidavit that Plaintiff's completed WH380 was not provided until September 16, 2003. Doc. 60-3, p. 3. Until that document was received, Plaintiff would not have been qualified for protection under the FMLA for his absences. *Id.*

Defendants have presented evidence of Plaintiff's attendance at work. Doc. 60-3 (ex. B). In 2003, Plaintiff was scheduled to be off on Sunday and Monday, and to work the remaining five days of each week. Doc. 60-3, pp. 4 and 32 (ex. B) (absences on calendar in yellow). Plaintiff was absent 2 of his scheduled 20 days of work in February, and missed 8 of his scheduled 21 days of work in March. *Id.* Plaintiff missed 3 more days in April, just one day in May, but then 3 more days of work in June, 2003. *Id.* Plaintiff's "attendance was extremely poor the last six months of 2003." Dpc. 60, p. 4. The records show that he missed 5 of his scheduled 23 days of work in July, missed 18 days in August, and missed 8 days of scheduled work in September. Doc. 60-3, p. 32 (ex. B). In October of 2003, Plaintiff missed 21 days of work, he missed 20 days in November, and missed 6 more days of work in December. *Id.*

The attendance records for 2004 reflect that Plaintiff continued to miss work with unscheduled absences,[4] often recorded as "AWOL." Doc. 60-3, pp. 4, 33-38 (ex. B) (absences on

[4] On the exhibits, all of the red colored boxes represent unscheduled absences. Doc. 60-3, p. 33 (ex. B).

calendar in red). In January, 2004, he missed 5 days of work with unscheduled absences. Doc. 60-3, pp. 33 (ex. B). In February, Plaintiff missed 11 more days with unscheduled absences. *Id.* In March, 2004, Plaintiff did not work a single day and all absences (18) were unscheduled. Doc. 60-3, p. 34 (ex. B). In April, 2004, 16 days were designated as unscheduled absences. *Id.* In May, 2004, Plaintiff had only 1 day as an unscheduled absence, but had four more missed days of work (leave without pay), and worked 15 days. Doc. 60-3, p. 35 (ex. B). In June, Plaintiff was documented with another 9 days of unscheduled absences. *Id.* Plaintiff had no unscheduled absences in July, August, or September, 2004. Doc. 600-3, pp. 36-37 (ex. B). In October, there were 4 more days of unscheduled absences. Doc. 60-3, p. 37 (ex. B). The 2004 year concluded with Plaintiff having 6 days of unscheduled absences in November and 2 more such days in December. Doc. 60-3, p. 38 (ex. B).

In summary, Plaintiff had 94 unscheduled absences in 2003 and 72 such absences in 2004. The total for the two years is 166 days absence without having scheduled the absence.

A request for disciplinary action was sent to Labor Relations in Jacksonville, Florida, by Plaintiff's supervisor on September 5, 2003. Doc. 60-3, pp. 4-5, 41 (ex. B). It was requested that Plaintiff receive a 7-day suspension for having been absent without leave from August 22-23, 2003, and August 26, 2003 (3 days since Sunday and Monday were off days). Doc. 60-3, pp. 4-5, 32, 41 (ex. B). The notes supporting the request state that Plaintiff did not call eRMS, although Plaintiff stated that he did,[5] Doc. 60-3, pp. 42-44 (ex. B); *see also* Exhibits H, K, and GG. Prior to requesting that discipline be imposed, the supervisor verified that Plaintiff failed to call in concerning his absences. Doc. 60, p. 4; doc. 60-3, p. 42 (ex. B); *see also* docs. 60-9, p. 1 (ex. H) and 60-12, p. 1 (ex. K).

Plaintiff was given notice of a 7-day "no-time off suspension" on September 15, 2003.[6] Doc. 60-3, pp. 4-5, 39 (ex. B). Plaintiff was charged with being AWOL on August 22-26, 2003,

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[5] Nevertheless, because of Plaintiff's poor attendance at work, he was advised on July 23, 2003, of the requirement to provide documentation for "each instance of sick leave." Doc. 60-3, p. 4 (ex. B).

[6] As a matter of clarification, the suspension was issued on September 15th and was, in part for the disputed FMLA leave. Plaintiff did not submit the required documentation (the WH380 form) for FMLA leave until the following day, September 16th. Doc. 60-3, p. 3 (ex. B).

and failure to maintain a regular work schedule, in the period June 13, 2003, to August 2, 2003, (absences and tardiness). *Id.*; *see also* doc. 60-34 (ex. GG). The notice explained that , as to Charge 1, Plaintiff failed to report to work as scheduled in the period August 22-26, 2003, and "did not call in to report [his] absence to eRMS as [he had] been instructed to do." Doc. 60-3, p. 39.[7] The suspension notice advised Plaintiff that he had been directed to provide documentation for his absence but failed to do so. *Id.* Charge 2 alleged that Plaintiff failed "to maintain a regular work schedule" and the notice advised of various problems with his work attendance on nine days: June 13, 2003, June 21, 2003, July 22-23, 2003, July 24-26, 2003, and August 1-2, 2003. Doc. 60-3, p. 39 (ex. B); doc. 60, p. 4; *see also* doc. 60-34 (ex. GG).

The United States Department of Labor investigated Plaintiff's 2003 7-day suspension for attendance-related problems and concluded there was no violation of the Family and Medical Leave Act. Doc. 60, p. 6; doc. 60-12, p. 46 (ex. K). Plaintiff's

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[7] This 7 day suspension was, in part, for not calling into eRMS on August 22nd, August 23rd, August 24th, or August 25th, although Plaintiff did not actually "serve time-off with: the suspension. Doc. 60-3, pp. 5, 39 (ex. B).

discipline was solely the result of his attendance problems. Doc. 60, p. 6.

Plaintiff received escalating discipline. "Because of his terrible attendance problems, he was counseled, put on sick leave restrictions . . ., [given] a 7-day suspension (he was allowed to work during this time, as well as receive his pay and benefits), given a 14-day suspension, and later removed.' Doc. 60-9, p. 3 (ex. H).

After the 7-day suspension letter was written, Plaintiff was granted some leave time under the FMLA. Doc. 60-9, pp. 3-4 (ex. H). However, the FMLA time still does not change the fact that Plaintiff did not report in to the automated system as required, did not provide documentation of his leave as required by his restricted sick leave status, and at the time his suspension was issued, he had *not yet* been approved for some FMLA leave. *Id.* Moreover, the belated FMLA leave, which still did not account for the entirety of Plaintiff's absences, did not nullify the violations alleged in charge 2, which "would still merit the 7-day suspension." *Id.*; *see also* doc. 60-12, pp. 1-2 (ex. K). An AWOL charge "is a more serious charge than failure to maintain a

regular work schedule in that an employee has either given no notification of his absence and has simply not shown up for work or the employee has been instructed to provide documentation of incapacity and has failed to do so." Doc. 60-34, p. 1 (ex. GG).

> In an affidavit, Labor Relations Specialist Harriet Dillhyon explains:
>
> > Acceptable FMLA documentation for the time period August 5-25, 2003 was not received until September 16, 2003. DOL FMLA regulations state that an employee must be allowed at least 15 calendar days from the date FMLA is requested to provide documentation (part 825.305 of the regulations). In actuality [Plaintiff's] documentation was untimely and could have been disallowed in its entirety. Regardless, his FMLA documentation does not negate the requirement to call to report his absence.

Doc. 60-12, p. 2 (ex. K) (citations omitted). She further states that "[r]egardless of FMLA status, [Plaintiff] was required to notify management in advance that he would be absent from work, and, in retrospect, those dates should not have been approved as FMLA-protected." *Id.*

There is evidence that Plaintiff "was AWOL from October 3 – December 6, 2003 and again from January 8-17, which warranted a 14-day suspension even with no prior elements of progressive discipline." Doc. 60-34, p. 2 (ex. GG). The 14-day

suspension was reduced to a 13-day suspension due to a grievance settlement dated June 8, 2004. Doc. 60-34, p. 2 (ex. GG).

"Plaintiff's excessive absences" was the "source of morale issues" at the Post Office. Doc. 6-5, p. 2 (ex. D). Plaintiff was "not dependable in reporting for work as scheduled" which "resulted in excessive overtime usage and" as an increase "work burden" on his co-workers. *Id.* Many complaints were received from Plaintiff's co-workers to Ms. Jackson, a Supervisor, at the U.S. Postal Service. *Id.* Plaintiff was deemed to be "irresponsible," one who under performed and could not maintain regular work attendance. Doc. 60-8, p. 6 (ex. G). Plaintiff "was frequently bickering with other people, was not dependable and was a distraction from other USPS employees doing their job." Doc. 60-9, p. 4 (ex. H). Mr. Willie Hightower, the Supervisor of Distribution Operations at the U.S. Postal Service, submitted an affidavit also stating that Plaintiff's "attendance was horrible." Doc. 60-7, p. 1 (ex. F). He states that Plaintiff "was excessively absent, including Absent Without Leave (AWOL), frequently did not even call in when he was going to be out, and was late in showing up to work."

Id. Furthermore, Plaintiff "would frequently take excessive breaks." *Id.*

Machine operations

Two machines

Plaintiff was never required to operate two machines at once as he alleged happened on September 6, 2003. Doc. 56, p. 6; doc 60, p. 5; doc. 60-9, p. 2 (ex. H); *see also* doc. 60-13, pp. 1-2 (ex. L). While he was assigned to operate two different machines, he was never required to do so simultaneously. *Id.* It is true that two other employees, both of whom are Caucasian males, have operated two machines at once, but Plaintiff was not required to do so. Doc. 60, p. 5; docs. 60-14, p. 1, and 60-15, p. 1 (exs. M, N). On the day in questions as claimed by Plaintiff, the volume of mail was very light. Doc. 60, p 5; doc. 60-16, p. 1 (ex. O).

Plaintiff's supervisor on that day, September 6, 2003, was Suzanne Monroe. Doc. 60-13, p. 1 (ex. L). Ms. Monroe submitted an affidavit in which she stated that she did not direct him to operate two postal cancellation machines at once. *Id.* Plaintiff's "job description was to operate two postal cancellation machines,

the Micro Mark (Mark II) and Advanced Facer Canceller (AFC)." Doc. 60-13, p. 2 (ex. L). "However, he was never required to work both machines at once."" *Id.* "On Saturdays, the volume of the mail was much lighter than during the week." *Id.*; *see also* doc. 60-14 (ex. M).

Stop button

On about January 20, 2004, when Plaintiff returned to work after a seven day absence, he discovered an emergency stop button on a canceling machine that was not working properly. Doc. 60, p. 5; doc. 60-17, p. 4 (ex. P); *see also* doc. 60-18, p. 2 (ex. Q). During Plaintiff's absence, the mail canceling system had been malfunctioning and Managers had initiated emergency procedures. *Id.* Those procedures would allow the canceling process to continue, but would provide safe working conditions for the employees. *Id.* The managers had a safety talk with the employees who worked in the affected area concerning the emergency procedures and none expressed any concerns over safety. *Id.*; *see also* doc. 60-5, p. 1 (ex. D). The machine "was always monitored and could be safely stopped at any time." Doc.

60-7, p. 1 (ex. F). Gerald L. Johnson, the Plant Manager, he stated in his affidavit:

> Mr. Wills was working NEAR a belt that had an unoperable stop switch. We were working under emergency conditions, because the programming controller for the entire 010 (canceling operation) system had broken. We had a supervisor and an Electronic Technician monitoring the system, starting and stopping each belt in the system manually as needed . The belt in question could be turned off at any time. Mr. Wills was in no danger. . . .
>
> It was explained to [Plaintiff] (by the supervisors on the floor) that the equipment was safe, but he refused to accept the explanation. Even the other mailhandlers working in the same area tried to tell him his claim was baseless. Everyone else was assisting in handling the emergency situation without complaints.

Doc. 60-18, p. 2 (ex. Q).

Plaintiff and the other employees of different races and genders worked in the same conditions. Doc. 60, p. 6; docs. 60-5, p. 1 (ex. D), 60-7, p. 1 (ex. F), 60-17, p. 2 (ex. P), 60-18, pp. 2-3 (ex. Q). Plaintiff stated in his EEO Affidavit that he was not aware of other co-workers who were treated more favorably with respect to working conditions. Doc. 60, p. 6; doc. 60-19, pp. 1, 5 (ex. R). Plaintiff's attendance problems were handled the same as any

other employee with similar problems. Doc. 60, pp. 6-7; doc. 60-21 (ex. T).[8] Plaintiff never filed a formal administrative complaint concerning his 13-day suspension or his removal. Doc. 60, p. 7; doc. 60-22, p. 3 (ex. U), doc. 60-23, p. 2 (ex. V). Plaintiff did not file an administrative tort claim either. Doc. 60, p. 7; doc. 60-35, p. 2 (ex. HH).

Disability

Plaintiff alleges that he is impaired by depression and anxiety. Doc. 60, p. 6; doc. 60-19, pp. 1, 5 (ex. R). Plaintiff states under oath in his EEO Affidavit that his impairment did not substantially limit any major life activity. Doc. 60, p. 6; doc. 60-19, pp. 1, 5 (ex. R). Plaintiff states that he has not needed or asked for an accommodation for this impairment, nor has his physician asked for an accommodation for him. Doc. 60, p. 6; doc. 60-11, pp. 2, 6-7 (ex. J), doc. 60-20, p. 1-4 (ex. S). Plaintiff's supervisors likewise state that Plaintiff never requested any accommodations and they were unaware of any claimed disability.

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[8] There is evidence that a Caucasian female, who was also employed as a mail handler, was treated similarly to Plaintiff. Doc. 60-21 (ex. T). That employee had a FMLA qualifying condition but "due to excessive absences, she did not qualify for FMLA in her last year of employment." *Id.* Progressive disciplinary measures were taken against her as well, also "progressing up to removal." *Id.*

Doc. 60, p. 6; doc. 60-5, p. 1 (ex. D), doc. 60-7, p. 2 (ex. F), doc. 60-8, pp. 1, 3, 6 (ex. G), doc. 60-36, p. 2 (ex. II). Plaintiff never submitted "any documentation indicating that he had a serious medical condition." Doc. 60-7, p. 2 (ex. F); doc. 60-8, p. 6 (ex. G).

Plaintiff's evidence

Plaintiff first filed a response to Defendant's summary judgement motion in July, 2003. Doc. 57. Plaintiff's amended response filed in October, 2007, doc. 68, refers to previously filed exhibits. The evidence attached to document 57 has been considered where relevant.[9] As with Defendant's documents, the references are to the page numbers on the electronic docket followed by the exhibit number.

Plaintiff has provided evidence by means of an affidavit from Margaret A. Taylor that in the late spring of 1995, he was employed as a Relief Tech 5, which meant that his job was to provide relief for Mr. Clark and Mr. Young, two mailhandlers who operated the AFC and the Micro Mark Cancellation Machine

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[9] Evidence concerning altercations between Willie Hightower and Plaintiff are not relevant to the claims pending in this complaint and have not been considered. These statements, some of which were not under oath, are : doc. 52-2, exs. 7, 9, 11; doc. 68-2, p. 63 (ex. 52). Also irrelevant is the deposition of Mr. Hightower concerning these incidents. Doc. 52-7, pp. 59-65 (ex. 33).

"[MMC"]. Doc. 57-2, p. 2 (ex. 2). Each employee had two fifteen minute breaks and a "half hour lunch plus a wash-up time for lunch." *Id.* This amounted to "approximately two to two and half hour per day." *Id.* When Plaintiff was "not relieving on the AFC or the MMC he would work in the 010, the 020 or the platform loading and unloading mail trucks." *Id.* "Once the cancellation of mail was done, Mr. Wills would be assigned to other duties such as unloading, loading mail trucks and dispatching mail either incoming or outgoing." *Id.* "When Mr. Wills was initially awarded the relief Tech job there was only one AFC and one MMC. It was not until a later date that the second AFC was installed in the Tallahassee Post Office." *Id.* Ms. Taylor does not state how long Plaintiff performed the duties of a Relief Tech 5.

Plaintiff disputes that he was employed as a Mail Processing Machine Operator and provided his own affidavit[10]

[10] Plaintiff's affidavit concludes with the following statement: "All the above written things are true to the best of my recollection and knowledge." Doc. 57-2, p. 8 (ex. 4). Plaintiff's affidavit is inadmissible in its present form because of the use of the qualifying language that the statements are correct "to the best of [his] recollection and knowledge." Like wise, the declaration by Margaret A. Taylor, a supervisor in 1995, is inadmissible as she also stated that her information is "true to the best of my recollection." Doc. 57-2, p. 2 (ex. 2).

stating that he was "a relief Tech operator which means that I relieve the machine operators when they go on break or have days off." Doc. 57-2, p. 5 (ex. 4). Plaintiff states that he "would unload mail from the truck, move pallets of mail around the facility for processing." *Id.* He states that he had to move the 800-pound pallets around by using a hand-truck since he could not get forklift training. *Id.* Plaintiff stated that he was allow to start the forklift training, but when Marilyn Dickens became his supervisor, the training was stopped because she said he did not need the training. *Id.*

A declaration expressing that statements are true to the best of one's recollection carries with it the implication that the affiant does not know whether the statements are true and correct and the affiant does not wish to be held accountable if they are not. While such a phrase ("to the best of my recollection") is common speech, it equivocates and, therefore, does not meet the requirements of Rule 56(e) that an affidavit "be made on personal knowledge" and "show affirmatively that the affiant is competent to testify to the matters stated therein." Rule 56(e)'s personal knowledge requirements prevents such statement "from raising genuine issues of fact sufficient to defeat summary judgement." Pace v. Capobiano, 283 F.3d 1275, 1278-79 (11th Cir. 2002). Accordingly, Plaintiff's "declaration" and that of Ms. Taylor should not be considered in response to Defendants' summary judgement motion.

Notwithstanding these defects, the Court has an obligation to allow the parties to remedy obvious defects in summary judgement materials, although a court is not required or permitted to become counsel to a litigant, even one who proceeds *pro se*. Griffith v. Wainwright, 772 F.2d 822, 825, n.6 (11th Cir. 1985), *citing* Barker v. Norman, 651 F.2d 1107, 1128-29 & n.26 (5th Cir. Unit A 1981). Plaintiff probably could correct the deficiencies in the declarations. Therefore, the declarations of Taylor and Plaintiff have been reviewed for the relevant facts as shown above.

Plaintiff reports that he "called into work every time [he] was absent unless it was an emergency and [he] could not call in." *Id.* He states: "Sometimes my condition gets really bad to where I need immediate attention and I go to my counselor, doctor or hospital." *Id.* Plaintiff acknowledges that he "was suspended in 2003 over [his] lengthy absence" and that in July, he "was denied leave and written up and placed on restricted sick leave . . ." *Id.* He also notes that his FMLA leave "was denied because they did not have my documentation prior to my being sick." *Id.* He states: "I do not know when my condition will interfere with my work, it depends on many factors, including the stress and harassment at work." *Id.* He states that he asked for breaks when under stress at work, sometimes when he needed to take his medication, "but they think I am asking for time to goof off, even when I tell them I need medication." Doc. 57-2, p. 4 (ex. 4). He States:

> I have a mental/emotional disability that effects my short term memory and the way I understand things, so many times I have to ask for directions more than once to make sure I understand them. Without my medication it is really hard to understand directions, but with my medication, I can do my work.

Id.

Plaintiff states that he felt he "was discriminated against because [he] did not fit in with [his] disability, and race." Doc. 57-2, p. 7 (ex. 2). He also states that he felt that he was "treated differently because [he] transferred from New Jersey and the other people were mainly from here and had a clique that [he] did not fit into." *Id.*

Plaintiff had provided the affidavit of Michael H. Joyner, President of the Local 318, National Postal Mailhandlers Union. Doc. 57-2, pp. 13-14 (ex. 8). Joyner states that Plaintiff was a former Mail Handler. *Id.*, p. 13. . Joyner asserts that Plaintiff's absences from August 5 through 25, 2003, were eventually found to covered b the FMLA, and he argues that therefore, his suspension for 7 days violated the FMLA.[11] *Id.*

Joyner states that the since Plaintiff's "weekend" was Sunday and Monday, when a holiday fell on those days, his "holiday" was Saturday. *Id.* He states that the records go back to the second quarter of 2003, and Plaintiff worked 9 out of 11 such "holidays" on a Saturday. *Id.* He states that two or three other

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[11] Plaintiff's second affidavit has also been reviewed. It is largely conclusory and repeats evidence already in the record, and otherwise does not supply relevant evidence for consideration. Doc. 68-2, pp. 23-24 (ex. 50).

Mail Handlers also had Saturday as a "non-scheduled" day and had signed up on the overtime Desired List. *Id.* Presumably Joyner is saying that those persons could have worked the Saturday in place of Plaintiff.

Joyner comments that he thinks it would be "prudent" for management to train Mail Handlers on the Powered Industrial Truck (PIT), the forklift. Doc. 57-2, p. 14 (ex. 8). "Rarely does a mailhandler work a tour of duty where he does not work at a task that would be more efficiently and timely accomplished with the use of a PIT." *Id.*

James Sampson has provided an affidavit concerning Plaintiff's work as a Relief Tech 5 in 1995. Doc. 57-2, pp. 16-17 (ex. 10). He provides evidence that Plaintiff had initial forklift training in 1995 as a Relief Tech 5. *Id.*, p. 17.

Nick Mosezar, a subsequent President of Local 318, wrote a letter to Plaintiff on November 17, 2005. Doc. 57-2, p. 35 (ex. 18A). Mr. Mosezar states that the union made a decision not to arbitrate over Plaintiff's removal from his job "due to lack of merit

and fact circumstances of said case and the extremely low likelihood of prevailing at the hearing." *Id.*

Plaintiff asserts that he filed an administrative tort claim under the Federal Tort Claims Act when he filed one of his EEO claims. Doc. 68, pp. 33-34, citing Defendant's ex. MM. The EEO charge does not allege any torts and does not seek any money damages. Doc. 57-2, pp. 1-3 (ex. MM). It only alleges discrimination due to race, gender, and disability. *Id.*, p. 1. None of the factual allegations could reasonably read as an attempt to begin the process for filing a federal tort claim.

Analysis

Exhaustion

Under well established law, pleadings filed by litigants without lawyers are entitled to liberal construction. Haines v. Kerner, 404 U.S. 519, 92 S. CT. 594, 30 L.ED.2d 652 (1972), *cited in* Eidson v. Arenas, 910 F.Supp. 609 612 (M.D. Fla.,1995). Yet, even giving that liberal reading, a *pro se* plaintiff's employment discrimination complaint remains "limited by the scope of the EEOC investigation which can be reasonably be expected to grow out of the charge of discrimination." Gregory v. Ga. Dep't of

Human Res., 355 F.3d 1277, 1280 (11th Cir. 2004) (*quoting* Alexander v. Fulton County, 207 F.3d 1303, 1332 (11th Cir. 2000)). In other words, "the allegations in a judicial complaint filed pursuant to Title VII may encompass any kind of discrimination like or related to the allegations contained in the charge." Gregory, 355 F.3d at 1280, *explaining* Sanchez v. Standard Brands, Inc., 431 F.2d 455, 466 (5th Cir. 1970). Thus, the charges Plaintiff filed with the Equal Employment Opportunity Commission must be carefully reviewed to determine whether all claims are properly exhausted and, accordingly, can be decided in this litigation.

Plaintiff filed two formal complaints (case 1H-321-0160-03 and case 1H-321-0022-04). Doc 60-40 (ex. MM); doc. 60-41 (ex. NN).

In the earliest EEO formal complaint, filed November 19, 2003, Plaintiff complained of these events, all which occurred in September of 2003: that he was denied forklift training; that he was not allowed to work overtime although Geneva Scurry was permitted to do so; that he was issued a suspension even though he had been approved for FMLA leave; the Willie Hightower

"became very hostile" to Plaintiff when telling him to sign on September 23, 2003; that he was ordered to operate two machines at the same time; and that he had to work on his holiday even though an employee with less seniority was given time off. Doc. 60-40, pp. 1-2 (ex. MM). He claimed discrimination due to race, gender, and disability. *Id.*, p. 1.

In the second formal EEO Complaint, filed on January 20, 2004, Plaintiff complained of being ordered to operate a Mark II machine that would not stop. Doc. 60-41, p. 1 (ex. NN)> He claimed discrimination due to race and disability. *Id.*

Shortly after his removal (termination) on April 15, 2005, Plaintiff was interviewed by an EEO counselor. Doc. 60-39, p. 1 (ex. LL). Plaintiff brought up the removal in this interview, alleging that this was caused by race and gender discrimination, but he did not allege that his removal was due to disability discrimination. *Id.* Moreover, this interview was not a formal complaint that his removal was based upon race or gender discrimination. The only two formal complaints are the Exhibits MM and NN discussed above, and those complaints did not

mention the 13 day suspension or removal. Doc. 60 p. 7; *see also* doc. 60-23 (ex. V).[12]

Accordingly, only the following seven claims of race and disability discrimination[13] can proceed in this court: (1) that Plaintiff was required to work on his holiday on August 30,, 2003; (2) was required to work two machines at the same time in September, 2003; (3) was denied forklift training in September, 2003; (4) was denied overtime during September, 2003; (5) on September 18, 2003, was issued a 7-day suspension; (6) on September 23, 2003, Willie Hightower was hostile; and (7) was ordered to work in unsafe conditions because the Mark II machine would not stop. *See* doc. 60-44 (ex. QQ). Defendant is entitled to summary judgement and other claims because they were not part of the two EEO complaints, nor would they have reasonably grown out of the investigation from those complaints.

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[12] Exhibit V is an affidavit by the "EEO/ADR Specialist," Sherry Shine-Green, that asserts review of the records reveals Plaintiff never initiated "a formal EEO Complaint alleging discrimination regarding his suspension and removal from employment" as he alleged in the Second Amendment Complaint. Doc. 60-23, p. 2 (ex. V).

[13] The first six claims in the EEO complaint were based upon race, gender, and disability discrimination, but Plaintiff omitted an gender discrimination claim in his second amended complaint.. The seventh claim in the second EEO complaint omitted a claim of gender discrimination.

Claims concerning Willie Hightower:

Plaintiff alleged in his EEO complaint dated November 12, 2003, that Willie Hightower was hostile to him on September 23, 2003. Doc. 60-40, pp. 1-2 (ex. MM). In the second amended complaint, Plaintiff alleged only two specific incidents of a "physical altercation" between himself and Willie Hightower, both occurring in 1995. Doc. 56, p. 4. Plaintiff further alleged that Mr. Hightower continued to "harass Plaintiff on the job," but Plaintiff did not identify the specific manner of any harassment or when that took place. The EEO investigation arising from a claim of harassment on September 23, 2003, could not reasonably have been expected to investigate claims of harassment as far back as 1995. Thus, Plaintiff did not exhaust his administrative remedies in his EEO charge with respect to harassment as far back as 1995.[14]

Even if the merits of this claim were to be considered, Defendant is entitled to summary judgement. Title VII protects an employee from being required to "work in a discriminatorily

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[14] Plaintiff contends in his own revised motion for partial summary judgement, doc. 70, that he exhausted his claim in EEO case number 1H-321-0106-03.

hostile or abusive environment." Harris v. Forklift Systems, Inc., 510 U.S. 17, 21, 114 S.CT. 367, 126 L.Ed.2d 295 (1993), *quoted in* National R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 116, 122 S.Ct. 2061, 2074 (2002) (other citations omitted). Isolated incidents are not sufficient to support such a claim. Only "[w]hen the workplace is permeated with "discriminatory intimidation, ridicule, and insult,' that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment,' Title VII is violated." Harris, 510 U.S. at 116, 122 S.Ct. at 2074. To review such a claim, a Plaintiff must demonstrate: "(1) that he belongs to a protected group; (2) that he had been subject to unwelcome harassment; (3) that the harassment must have been based on a protected characteristic of the employee, such as national origin; (4) that the harassment was sufficiently severe or pervasive to alter the terms and conditions of employment and create a discriminatory abusive working environment; and (5) that the employer is responsible for such environment under either a theory of vicarious or of direct

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That is the EEO complaint dated November 12, 2003, referenced above. Doc. 60-40 (ex. MM).

liability." Miller v. Keworth of Dothan, Inc., 277 F.3d 1269, 1275 (11th Cir. 2002).

Plaintiff provides no evidence that any such "harassment" from Willie Hightower, whether on September 23, 2003, or years earlier, was due to a protected characteristic or status. No evidence exists in this record that any hostility towards Plaintiff was due to anything more than a personal conflict. That another employee may be unreasonably "hostile" is not a viable Title VII claim because "Title VII is not a federal 'civilitycode.'" Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 118 S.Ct. 998, 1000-02, 140 L.Ed.2d 201 (1998), *quoted in* Mendoza v. Borden, Inc., 195 F.3d 1238, 1245 (11th Cir. 1999). In other words, Title VII does not permit an employee to sue based on "the ordinary tribulations of the workplace," including isolated abusive language, gender-related jokes, occasional teasing, and the like. *See* Faragher v. City of Boca Raton, 524 U.S. 775, 118 S.Ct. 2275, 2283, 141 L.Ed.2d 662 (1998). Federal law does not require that all persons treat each other politely. There is no evidence in this record that Willie Hightower took any action against the Plaintiff due to Plaintiff's race, age, sex, or other protected category. For

these two reasons, Defendant is entitled to summary judgement on this claim.

Defendant is also entitled to summary judgement on Plaintiff's state law tort claims for negligent retention, negligent infliction of emotional distress, and the intentional infliction of emotional distress. Because these are tort claims, Defendant is correct in arguing that Plaintiff's exclusive remedy is under the Federal Tort Claims Act, 28 U.S.C. § 2671, *et seq.* Doc. 60, pp. 9-10. Under 28 U.S.C. § 2675(a), an action may "not be instituted" unless the Plaintiff "shall have first presented the claim to the appropriate Federal Agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail." Plaintiff did not submit these claims under the procedures established by the Federal Tort Claims Act. Thus, Defendant is entitled to summary judgement on all of these tort claims.

While considering this claim, it is noted that Plaintiff filed his own motion for partial summary judgement, doc. 62, which was then replaced by his revised motion for partial summary judgement. Doc. 70. Plaintiff argued that Defendant ""id not assert any defense, affirmative or otherwise, for the claim

regarding the negligent retention of Willie Hightower as a supervisor over Plaintiff." Doc. 70, p. 2. As noted above, Plaintiff's assertion is misplaced because Defendant *did* assert a defense. Although Defendant did not specifically argue the Plaintiff's claim for the "negligent retention" was barred because Plaintiff failed to pursue this claim through the Federal Tort Claims procedure, the Defendant *did* argue that Plaintiff did not exhaust the tort claims. Doc. 60, pp. 9-10. This claim is part of the tort claims. Furthermore, Defendant argued that if Plaintiff had any cause of action under the Federal Tort Claims Act, 28 U.S.C. § 2679(a), the agency is not the proper Defendant; rather, claims concerning any wrongful or negligent act are to be brought "against the United States." Thus, Defendant did assert a defense and Plaintiff's revised motion for partial summary judgement should be denied.

Moreover, as noted above, Plaintiff has failed to provide any evidence to support such a claim because there is no evidence of any unlawful discriminatory harassment by Willie Hightower. Thus, the employer cannot be vicariously liable for retaining Willie Hightower as a supervisor.

Disability Claims:

There are six remaining claims which Plaintiff brings both as disability and race discrimination. Doc 56. Plaintiff's disability claims are brought under the American with Disabilities Act and the Rehabilitation Act. The rehabilitation Act provides that "[n]o otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of his or her disability, . . . be subjected to discrimination under any program or activity . . . conducted by . . . the United States Postal Service." 29 U.S.C. § 794(a). Rolland v. Potter, 492 F.3d 45, 47 (1st Cir. 2007). Section 705(20) of the Act defines an "individual with a disability" as "any person who . . . has a physical or mental impairment which substantially limits one or more of such person's major life activities" or "has a record of such an impairment" or "is regarded as having such an impairment." *Id.*, § 705(20)(B), *quoted in* Rolland, 492 F.3d at 47. This is a demanding standard which requires "a permanent or long term impairment" which "prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives." Rolland, 492

F.3d at 47-48, *explaining* Toyota Motor Manufacturing, Kentucky, Inc v. Williams, 534 U.S. 184, 122 S.Ct. 681, 151 L.Ed.2d 615 (2002).

The ADA provides very similar language: no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. A disability under the ADA is also defined similarly: "(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." 42 U.S.C. § 12102(2).

> The Supreme Court has explained that "[w]hen the major life activity under consideration is that of working, the statutory phrase 'substantially limits' requires, at a minimum, that plaintiffs allege they are unable to work in a broad class of jobs." *Sutton v. United Air Lines, Inc.*,527 U.S. 471, 491, 119 S.Ct. 2139, 144 L.Ed.2d 450 (1999). Indeed, the Equal Employment Opportunity Commission (EEOC) regulations interpreting the ADA make it abundantly clear that an individual's ability to work is "substantially limited" when the individual is "significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in

> various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working."

D'Angelo v. ConAgra Foods, Inc., 422 F.3d 1220, 1227 (11th Cir. 2005), *quoting* 29 C.F.R. § 1630.2(j)(3)(I). Additionally, the Court has stated that "[a] person whose physical or mental impairment is corrected by medication or other measures does not have an impairment that presently 'substantially limits' a major life activity." Sutton, 527 U.S. at 482-83, 119 S.Ct. at 2146-47: *quoted in* Greenberg v. BellSouth Telecommunications, Inc., 498 F.3d 1258, 1264 (11th Cir. 2007).

Federal law prohibits discrimination against a qualified individual with a disability "who, with or without reasonable accommodation, can perform the essential functions of his job without accommodation, or, failing that, show that he can perform the essential functions of his job with a reasonable accommodation." Davis v. Fla. Power & Light Co., 205 F.3d 1301, 1305 (11th Cir. 2000); *citied in* D'Angelo, 422 F.3d at 1229.

Thus, to survive Defendant's summary judgement motion, Plaintiff has the burden of establishing that (1) he has a disability

as defined by the Act, (2) "he is a 'qualified individual,' which is to say, able to perform the essential functions of the employment position that he holds or seeks with or without reasonable accommodation, and (3) the defendant unlawfully discriminated against him because of the disability." Reed v. The Heil Co., 206 F.3d 1055, 1061 (11th Cir. 2000), *quoted in* D'Angelo, 422 F.3d 1220, 1226 (11th Cir. 2005), *citing* Silvera v. Orange County Sch. Bd., 244 F.3d 1253, 1262 (11th Cir. 2001); Brungart v. BellSouth Telecomm., Inc., 231 F.3d 791, 800 (11th Cir. 2000)>

Defendant's evidence, discussed above, demonstrates without genuine dispute of fact that many elements of proof are missing from Plaintiff's disability claim. There is no genuine dispute of material fact that Plaintiff's experience of depression and anxiety do not substantially limit any major life activity. Doc. 60, p. 6; doc. 60-19, pp. 1, 5 (ex. R). In his first EEO affidavit, when asked in question 14 to state his mental disability, Plaintiff responded: "depression, anxiety." Doc. 60-11, p. 2,6 (ex. J). When asked in question 15 whether the mental disability was a permanent condition, Plaintiff answered: "I don't know my Doctor said it may or may not go away." *Id.*, pp, 2, 7, When asked

question 16 whether his disability substantially impaired any major life activity such as "walking, seeing, hearing, speaking, breathing, learning, working, etc.," Plaintiff responded that he had "very bad headache (migraine)" which rendered him unable to perform "work duties as required." *Id.*, pp. 2, 7 (ex. J). A migraine headache, however, is not a disability claimed by Plaintiff in this case.

Plaintiff also states that he has not needed or asked for an accommodation for this impairment, nor has his physician asked for an accommodation for him. Doc. 60, p. 6; doc. 60-11, pp. 2, 6-7 (ex. J), doc. 60-20, pp.1-4 (ex. S). Plaintiff's supervisors likewise state that Plaintiff never requested any accommodations and they were unaware of any claimed disability. B Doc. 60, p. 6; doc. 60-5, p. 1 (ex. D), doc. 60-7, p. 2 (ex. F), doc. 60-8, pp. 1, 3, 6 (ex. G), doc. 60-36, p. 2 (ex. II). Defendant has further presented evidence that Plaintiff never submitted "any documentation indicating that he had a serious medical condition." Doc. 60-7, p. 2 (ex. F); doc. 60-8, p. 6 (ex. G). This is further evidence that Plaintiff was not substantially limited in a major life activity, and that Defendant had no reason to perceive that he was so limited.

In response to the pending summary judgement motion, Plaintiff has presented argument that he is disabled under federal law. Doc. 68, p. 9, *et seq.* Plaintiff contends that the statements made in his deposition were made "without a clear understanding of what 'substantially limited','severely restricts','major life activity', or 'reasonable accommodation' meant under the law. *Id.*, at 10. Plaintiff now asserts, by way of argument, that he now understands "his disability is a covered disability." *Id.*, at 11. Plaintiff states that "his mental disability interferes with work and cognitive understanding." *Id.*

In support of that statement, Plaintiff points to evidence of a "medical certification and/or clearance to return to work." Doc. 57-7 (ex. 35). That document, however, reveals that plaintiff was "fit for duty" as of August 26, 2003. *Id.*, p. 1 (p. 103 if viewed as a consolidated document). The doctor indicated Plaintiff's condition was "improved" with counseling and medication. *Id.* This evidence reveals that even if Plaintiff could be considered to have a temporary impairment, Plaintiff's own doctor reported that he was improved and fit to work with the corrections made by medication and counseling.

The undisputed evidence in this case falls short of establishing that he is "substantially limited" in any major life activity. Rather, the evidence reveals Plaintiff's own perception that he was not limited. Those perceptions, given at time close to the events in question, are strong evidence that Plaintiff's mental status did not limit his life activities. The suggestion now, presented through argument and not evidence, is insufficient to create a genuine dispute of material fact. It cannot then be presumed that Plaintiff was regarded as having a disability under the law by his supervisors when Plaintiff himself did not regard himself in this fashion.

Even more persuasive is Plaintiff's own concession that he never asked for any accommodation in his work environment. No accommodations were requested because no accommodations necessary. Though Plaintiff has shown that he suffers from anxiety and depression, he has not shown that his condition rises to the level of a "disability" as defined by either the Rehabilitation Act or the ADA.

Plaintiff's argument that his requests for forklift training were requests for a reasonable accommodation, doc. 68, p. 12, is

not persuasive. Plaintiff testified under oath in his deposition that he "never asked for accommodations" from the Post Office. Doc. 60-20, pp. 1, 3 (ex. S). Moreover, the evidence is that Plaintiff repeatedly asked for forklift training and his requests were denied because such training was not necessary for Plaintiff to perform his job as Machine Operator. Thus, such training could not have been a reasonable accommodation because it would not have helped Plaintiff perform his job. Further, there is no evidence on this record that Plaintiff requested such training so that he could perform a *different* job as an accommodation, or that driving a forklift would have helped him cope with depression and anxiety.

Plaintiff has now attempted to present a list of other "reasonable accommodation" that he suggests that the Post Office could have provided without "undue hardship." Doc. 68, p. 13. Defendant cannot, however, be held liable for not providing an accommodation that was never requested. Plaintiff never sought other job-related accommodations and these requests, made during litigation, are too late.

Plaintiff, however, has presented argument that his "supervisors" were given "paperwork from his doctors." Doc. 68, p. 13. To support that assertion, Plaintiff points to several exhibits. Plaintiff's exhibit 54, however, is a "progress note" from a physician dated October 1, 2003, noting Plaintiff has depression which is being treated with Paxil. Doc. 68-2, p. 34 (ex. 54). The exhibit also states that Plaintiff reported having a "stressful work environment" and that he was given a "work excuse." *Id.* This exhibit falls short of demonstrating knowledge of a "disability;" rather, it is simply a reason for Plaintiff's absence from work. Plaintiff also pointed to exhibit 57, which is a doctor's excuse for a three day absence, beginning on October 16, 2003. Doc. 68-3, p. 5 (ex. 57). This exhibit is insufficient to demonstrate Plaintiff's supervisors were advised that Plaintiff suffered from a "disability." The third exhibit Plaintiff has pointed to is exhibit 58. Doc. 68-3, p. 6 (ex. 58). This exhibit is simply a colonoscopy procedure report and has no bearing on this case or an alleged "disability" for depression or anxiety.

It is "insufficient for individuals attempting to prove disability status under this test to merely submit evidence of a

medical diagnosis of an impairment." Toyota Motor Mfg., Ky,. V. Williams, 534 U.S. 184, 198, 122 S.Ct. 681, 691, 151, L.Ed.2d 615 (2002). Instead, one must "prove a disability by offering evidence that the extent of the limitation [caused by their impairment] in terms of their own experience . . . is substantial." Albertson's, Inc. v. Kirkingburg 527 U.S. 555, 567, 119 S.Ct. 2162, 144 L.Ed.2d 518 (1999). Not everyone who suffers from depression or anxiety is disabled, and indeed, few such people are disabled. Furthermore, an impairment must be "permanent or long term" and work excuses for several days absences fall woefully short of that requirement. Toyota Motor Mfg,. Inc., 534 U.S. at 198, 122 S.Ct. at 691.

Plaintiff asserts that the EEO investigation should have given his supervisors notice that he claimed he had a disability. Doc. 68, pp.13-14. However, the documents generated during that investigation and Plaintiff's requests for time off also fall short of demonstrating a "disability," much less that Plaintiff's supervisors knew of it. Indeed, the documents themselves reveal that none of Plaintiff's supervisors had any knowledge that Plaintiff had a mental "disability." *See*, e.g., doc. 60-8, pp. 3-6 (ex. G). During the

EEO investigation the supervisors were asked if they were aware that Plaintiff had a mental disability (depression or anxiety); all answered, "No." The follow-up question was whether Plaintiff ever provided "medical documentation to support a request for FMLA leave is not the same as providing documentation to show one's employer that the employee suffers from a "disability" as defined by the ADA or the Rehabilitation Act.

In Sum, Plaintiff has not demonstrated a genuine issue of material fact as to this claim of disability discrimination. While Plaintiff has shown he suffers from depression and anxiety, that falls short of showing that Plaintiff had a "disability" due to those conditions. Moreover, Plaintiff has not shown that any supervisor had any knowledge of any disability or regarded Plaintiff as disabled. Finally, Plaintiff has not shown that his depression and anxiety are impairments which are either "long term" or permanent conditions. Therefore, summary judgement should be granted in Defendant's favor on all of Plaintiff's disability claims.

Title VII Claims:

Title VII makes it unlawful for an employer "to discharge and individual, or otherwise to discriminate against any

individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a). Plaintiiff's Title VII claims must be analyzed under the framework established by the United States Supreme Court in the case of McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). There, the court established a burden-shifting framework for proving a discrimination case based upon circumstantial evidence. First, a plaintiff must establish a *prima facie* case of discrimination by showing he was a qualified member of a protected class and was subjected to an adverse employment action not imposed on other similarly situated employees outside his protected class. Wilson v. B/E Aerospace, Inc., 376 F.3d 1079, 1087 (11th Cir. 2004), *citing to* Mcdonnell Douglas, 411 U.S. at 802, 93 S.Ct. at 1824; Holifield v. Reno, 115 F.3d 1555, 1562 (11th Cir. 1997). When the plaintiff establishes a *prima facie* case, creating a presumption of discrimiination, the burden of production shifts to the employer to articulate a legitimate, nondiscriminatory reason for its actions. Wilson, 376 F,3d at 1087, *citing* Texas Dep't of Communnity

Affairs v. Burdine, 450 U.S. 248, 254, 101 S.Ct. 1089, 1094, 67 L.Ed.2d 207 (1981).

> If the defendant fails to meet its burden of production, the plaintiff is entitled to judgement as a matter of law based on his unanswered prima facie case. *Id.*; *Wright v. Southland Corp.*, 187 F.3d 1287, 1291 (11th Cir. 1999). On the other hand, if a plaintiff fails to establish a prima facie case, the defendant is entitled to judgement as a matter of law (unless the plaintiff can prove discrimination by some other means, such as by direct evidence of discrimination). *See, e.g., Cooper v. Southern Co.*, 390F.3d 695, 745 (11th Cir. 2004) (affirming the district courts grant of summary judgement to the defendant in a compensation discrimination case because the plaintiff failed to establish her prima facie case); *Schoenfeld v. Babbitt*, 168 F.3d 1257, 1267 (11th Cir. 1999) (same)

Collado v. United Parcel Service, Co., 419 F.3d 1143, 1150 (11th Cir. 2005).

Defendant argues that "Plaintiff cannot establish a prima facie case of disparate treatment discrimination with respect to any of the alleged actions, because he cannot identify a similarly situated comparison employee who was treated more favorably." Doc. 60, p. 18. Defendant has presented evidence that each of the persons Plaintiff identified as being "similarly situated" to him were not in fact similarly situated with respect to the particular

employment opportunity in question. *Id.*, at 18-20. Plaintiff has not provided any evidence to raise a genuine dispute of material fact as to the existence of "similarly situated" persons who were treated differently. Since Plaintiff has not come forward with evidence to prove a *prima facie* case of discrimination, Defendant is entitled to summary judgement on all of Plaintiff's Title VII claims.

For example, Plaintiff claimed he was required to work on his holiday on August 30, 2003, but Connie Maciora was allowed to be off that day. Defendant has shown that Plaintiff and Ms. Maciora worked in different areas. Plaintiff was a machine operator and Ms. Maciora was a part time employee. Treatment of full-time employees and part-time employees will naturally vary. There were more mail handlers than machine operators. Furthermore, during the month of August, Plaintiff was absent most of the time and returned to work on Wednesday, August 17th. Doc. 60-12, p. 1. When Plaintiff did return to work he was told he had to work on Saturday, August 30th, which would have been Plaintiff's holiday. *Id.* Ms. Maciora, on the other hand, had previously submitted a request for annual leave for that day and,

thus, she was not required to work. *Id.* Thus, Ms. Maciora was not similarly situated to Plaintiff.

Nor is there any evidence that this employment decision was based on racial discrimination. Rather, the only evidence is that it was based on the needs of the Post Office in processing the mail in an efficient manner. Plaintiff had already been absent for most of August and, in fact, only worked August 27-30 of that month. Doc. 60-3, p. 32. Defendant is entitled to summary judgement as to this claim.

No evidence has been presented to show that Plaintiff was required to work two machines at the same time in September, 2003. Plaintiff was not treated differently than any other employee because he was never ordered to simultaneously operate two machines. Defendant is entitled to summary judgement on this claim.

There has been no evidence that the denial of forklift training in September, 2003, was based on discrimination. All of the evidence presented reveals that no other employee who occupied Plaintiff's position had forklift training. Thus, Plaintiff has failed to prove a *prima facie* case. Further, there is no

evidence that such training was necessary for Plaintiff to perform his primary job as a machine operator. Defendant's reasons for the decision were not raced-based. Thus, this claim fails as well.

There is no evidence that the denial of overtime during September, 2003, was due to discrimination. Rather, the evidence establishes that there was no need for Plaintiff to work overtime because there was already another machine operator available to work during that time, Mr. Kenny Young. Mr. Young was listed on the "Overtime Desired List," and Plaintiff was not, and thus not similarly situated. Moreover, Geneva Scurry was allowed to work overtime and was called in to replace another mail handler. Ms. Scurry was not performing the same work as Plaintiff would have performed. There has been no evidence of discrimination based on these facts. Rather, the *prima facie* case fails and, further, Defendant has presented legitimate non-discriminatory reasons to support the employment decision made.

Defendant's evidence reveals that the 7-day suspension in September, 2003, was justified based upon Plaintiff's attendance record. Plaintiff has not shown that any other employee on restricted sick leave status was treated any differently. Plaintiff

was placed on such status because of his poor attendance. Plaintiff was required to provide documentation each time he was out on sick leave. Even with that requirement, his attendance remained poor. Plaintiff was required to report in to the eRMA System when he would be absent, but Plaintiff did not always simply. Plaintiff's attendance records show many dates he was absent without authorization and discipline was justified due to these failures.

Plaintiff has disputed Charge 1 of the suspension based on FMLA leave. However, the notice was issued on September 15, 2003. At *that* time, Plaintiff had not yet submitted the paperwork for FMLA leave. Plaintiff did not finally comply by providing the paperwork until after the notice was issued. Even discounting Charge 1, discipline was still justified due to the nine separate days of absences listed in Charge 2. Plaintiff failed to maintain a regular work schedule. Since he had already been placed on restricted sick leave, this was the next level of discipline. The undisputed evidence demonstrates that discipline was imposed on a progressive and non-discriminatory basis. Summary judgement is appropriately entered in Defendants favor on this claim.

Plaintiffs final Title VII discrimination claim is that he was ordered to work in unsafe conditions because the Mark II machine would not stop. *See* doc. 60-44 (ex. QQ). There is no evidence that Plaintiff was singled out to work in conditions unique to him. Plaintiff was working under the same condition as all other employees working on that machine. There can be no discrimination in this situation. That Plaintiff objected to these conditions is not sufficient to prove discrimination.

There has simply been no evidence presented to show that Plaintiff was treated differently because of his race. The evidence reveals a legitimate basis for all decisions made. Plaintiff has not come forward with any evidence which shows that any of Defendant's reasons were a mere pretext for discrimination. Thus, Defendant should be granted summary judgement on all Plaintiff's Title VII claims.

Retaliation

Plaintiff claims that Defendant retaliated against him because he filed EEO complaints.

> To establish a prima facie case of retaliation , a plaintiff must show that (1) she engaged in protected activity, (2) she suffered an adverse employment

> action, and (3) there was a causal link between the protected activity and the adverse employment action.

Stavropoulos v. Firestone, 361 F.3d 610, 616 (11th Cir. 2004), *citing* Bass v. Bd. Of County Comm'rs, Orange County, FLA.,256 F,3d 1095, 1117 (11th Cir. 2001). Under Title VII's anti-retaliation provision, "an adverse employment action" means either "an ultimate employment decision" or some other decision that meets a "threshold level of substantiality." Stavropoulos, 361 F.3d at 616, *citing* Bass, 256 F.3d at 1181. An "ultimate employment decision" would be decisions such as termination, failure to hire, failure to promote, a demotion, or lessening of pay, position, or benefits. Wideman v. Wal-Mart Stores, Inc., 141 F.3d 1453, 1456 (11th Cir. 1998); *see also* Stavropoulos, 361 F.3d at 616-617.

> In Wideman, 141 F.3d at 1455-56, we concluded that the plaintiff had crossed the threshold of substantiality where she established that her employerhad improperly listed her as a no-show on a day she was scheduled to have off, gave her written reprimands which resulted in a one-day suspension, solicited comments on her performance from only those employees with negative things to say about her, failed to schedule her for work, threatened to shoot her in the head, and delayed authorizing medical treatment for an allergic reaction she was having. *Id.* At 1455-56 (holding that the totality of these acts meet the threshold of substantiality, but

> declining to decide whether anything less than the totality would meet the threshold).

Stavropoulos, 361 F.3d at 617.

Here, Plaintiff's claims of retaliation do not concern an "ultimate employment decision." Plaintiff's complaint itself fails to present a viable claim of retaliation because Plaintiff has done nothing more than assert that Allen Scott retaliated and "would not allow [Plaintiff] to talk to shop steward." Doc. 56, p. 5. That fails under the substantiality test.

Plaintiff also alleged that Tracey Jackson retaliated by ordering him to work on an unsafe machine. Doc. 56, p. 5. This allegation fails as an actionable act of retaliation because it is undisputed that all employees were working under the same conditions when operating the machine Plaintiff alleged was unsafe. Plaintiff was not treated differently than other employees.

Plaintiff alleged that pant manager Jerry Johnson retaliated with verbal threats and told Plaintiff he better not call the police unless he had a bullet in his head. Doc. 56, p. 5. This alleged threat also is insufficient to state a claim for retaliation

because there was no adverse employment action taken against Plaintiff. Widermanis distinguished as involving a much greater series of unfavorable actions against the employee.

Plaintiff's allegation of retaliation by Suzanne Moore is similarly unsupported. Suzanne Moore was his supervisor on September 6, 2003, and allegedly told him on the date "to work two machines at once." Doc. 56, p. 6. Apparently this is the alleged retaliatory act. However, Plaintiff did not file EEO claim 1H-321-0105-03 until November 19, 2003, and he filed EEO claim 1H-321-002-04 on January 20, 2004. Doc. 60-40 (ex. M) and 60-41 (ex. NN). Thus, the alleged retaliation preceded both EEO claims. Plaintiff could not have suffered retaliation by Ms. Moore on September 6, 2003, for having filed these charges.

Conclusion

For all of these reasons, it is **RECOMMENDED** that Defendant's motion for summary judgement, doc. 60, be GRANTED, that Plaintiff's revised motion for partial summary judgement, doc. 70, be DENIED, and that the order direct the Clerk of Court to enter judgement in favor of the Defendant on all Claims.

IN CHAMBERS at Tallahassee, Florida, on January 15, 2008.

S/ William C. Sherrill. Jr.

WILLIAM C. SHERRILL, JR.
UNITED STATES MAGISTRATE JUDGE

NOTICE TO THE PARTIES

A party may file specific, written objections to the proposed findings and recommendations within 15 days after being served with a copy of this report and recommendation. A party may respond to another party's objections within 10 days after being served with a copy thereof. Failure to file specific objections limits the scope of review of proposed factual findings and recommendations.

[1] References are to the paper copy and page number, followed by a reference (in parenthesis) to the corresponding documentation and page in the electronic docket for documents on the electronic docket. Both citations are referenced as a *pro se* litigant will not have ready access to the court's electronic docket.

[2] That contract also provide states that "overtime work shall be scheduled among qualified full time regular employees doing similar work in the work location where the employees regularly work . . ." Doc. 60-3, p. 7 (ex. B). Furthermore, full time employees are required to sign an "overtime desired" list. *Id.*

[3] Ms. Busey explains in her affidavit that Plaintiff's completed WH380 was not provided until September 16, 2003. Doc. 60-3, p. 3. Until that document was received, Plaintiff would not have been qualified for protection under the FMLA for his absences. *Id.*

[4] On the exhibits, all of the red colored boxes represent unscheduled absences. Doc. 60-3, p. 33 (ex. B).

[5] Nevertheless, because of Plaintiff's poor attendance at work, he was advised on July 23, 2003, of the requirement to provide documentation for "each instance of sick leave." Doc. 60-3, p. 4 (ex. B).

[6] As a matter of clarification, the suspension was issued on September 15th and was, in part for the disputed FMLA leave. Plaintiff did not submit the required documentation (the WH380 form) for FMLA leave until the following day, September 16th. Doc. 60-3, p. 3 (ex. B).

[7] This 7-day suspension was, in part, for not calling into eRMS on August 22nd, August 23rd, August 24th, or August 25th, although Plaintiff did not actually "serve time-off with: the suspension. Doc. 60-3, pp. 5, 39 (ex. B).

[8] There is evidence that a Caucasian female, who was also employed as a mail handler, was treated similarly to Plaintiff. Doc. 60-21 (ex. T). That employee had a FMLA qualifying condition but "due to excessive absences, she did not qualify for FMLA in her last year of employment." *Id.* Progressive disciplinary measures were taken against her as well, also "progressing up to removal." *Id.*

[9] Evidence concerning altercations between Willie Hightower and Plaintiff are not relevant to the claims pending in this complaint and have not been considered. These statements, some of which were not under oath, are : doc. 52-2, exs. 7, 9, 11; doc. 68-2, p. 63 (ex. 52). Also irrelevant is the deposition of Mr.

Hightower concerning these incidents. Doc. 52-7, pp. 59-65 (ex. 33).

[10] Plaintiff's affidavit concludes with the following statement: "All the above written things are true to the best of my recollection and knowledge." Doc. 57-2, p. 8 (ex. 4). Plaintiff's affidavit is inadmissible in its present form because of the use of the qualifying language that the statements are correct "to the best of [his] recollection and knowledge." Like wise, the declaration by Margaret A. Taylor, a supervisor in 1995, is inadmissible as she also stated that her information is "true to the best of my recollection." Doc. 57-2, p. 2 (ex. 2).

A declaration expressing that statements are true to the best of one's recollection carries with it the implication that the affiant does not know whether the statements are true and correct and the affiant does not wish to be held accountable if they are not. While such a phrase ("to the best of my recollection") is common speech, it equivocates and, therefore, does not meet the requirements of Rule 56(e) that an affidavit "be made on personal knowledge" and "show affirmatively that the affiant is competent to testify to the matters stated therein." Rule 56(e)'s personal knowledge requirements prevent s such statement "from raising genuine issues of fact sufficient to defeat summary judgement." Pace v. Capobiano, 283 F.3d 1275, 1278-79 (11th Cir. 2002). Accordingly, Plaintiff's "declaration" and that of Ms. Taylor should not be considered in response to Defendants' summary judgement motion.

Notwithstanding these defects, the Court has an obligation to allow the parties to remedy obvious defects in summary judgement materials, although a court is not required or permitted to become counsel to a litigant, even one who proceeds *pro se*. Griffith v. Wainwright, 772 F.2d 822, 825, n.6 (11th Cir. 1985), *citing* Barker v. Norman, 651 F.2d 1107, 1128-29 & n.26 (5th Cir. Unit A 1981). Plaintiff probably could correct the deficiencies in the declarations. Therefore, the declarations of Taylor and Plaintiff have been reviewed for the relevant facts as shown above.

[11] Plaintiff's second affidavit has also been reviewed. It is largely conclusory and repeats evidence already in the record, and otherwise does not supply relevant evidence for consideration. Doc. 68-2, pp. 23-24 (ex. 50).

[12] Exhibit V is an affidavit by the "EEO/ADR Specialist," Sherry Shine-Green, that asserts review of the records reveals Plaintiff never initiated "a formal EEO Complaint alleging discrimination regarding his suspension and removal from employment" as he alleged in the Second Amendment Complaint. Doc. 60-23, p. 2 (ex. V).

[13] The first six claims in the EEO complaint were based upon race, gender, and disability discrimination, but Plaintiff omitted an gender discrimination claim in his second amended complaint.. The seventh claim in the second EEO complaint omitted a claim of gender discrimination.

[14] Plaintiff contends in his own revised motion for partial summary judgement, doc. 70, that he exhausted his claim in EEO case number 1H-321-0106-03. That is the EEO complaint dated November 12, 2003, referenced above. Doc. 60-40 (ex. MM).

S/ William C. Sherrill
Magistrate Judge

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

Kenneth B. Wills,

Plaintiff,

4:05cv381-WS

v.

JOHN E. POTTER,
POSTMASTER GENERAL,

Defendant.

ORDER ADOPTING THE MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

Before the court is the magistrate judge's report and recommendation (doc.73) docketed January 15, 2008. The magistrate judge recommends that the defendant's motion for summary judgment be granted. The plaintiff has filed objections (doc. 74) to the report and recommendation.

The court, having considered in light of the plaintiff's objections, it is

ORDERED:

1. The magistrate judge's report and recommendation (doc. 73) is ADOPTED and incorporated by reference into this order.
2. The defendant's motion for summary judgment (doc.60) is GRANTED.
3. The plaintiff's revised motion for partial summary judgment (doc.70) is DENIED.
4.]The clerk shall enter judgment in the defendant's favor on all claims.

DONE AND ORDERED this 27th day of March 2008.

S/ William Stafford

Senior United States District Judge

APPENDIX D

Title VII of the Civil Rights Act of 1964 made it an unlawful practice:

[F]or an employer... to discriminate against any individual..., because of such individual's race, color religion, sex, or national origin."

78 Stat. 255, 42 U.S.C. § 2000e-2(a)(1).

Title Vii of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-3(a) contains an anti-retaliation provision, forbidding employers from retaliating or from taking adverse personnel action against employees, who exercise their lawful and protected rights under Title VII:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees... because he has opposed any practice made an unlawful practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation proceeding or hearing under this subchapter.

The Civil Rights Act of 1991 establishes an alternative for proving that an "unlawful employment practice" has occurred:

> Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

42 U.S.C. § 2000e-2m.

The Age discrimination in Employment Act (ADEA) of 1967, 29 U.S.C. §621 et seq., 633a prohibits discrimination because of age in the Federal Government. **Section 631(b)** states:

In the case of any personnel actions affecting employees... the prohibitions of this title shall be limited to individuals who are at least 40 years of age.

The Family Medical Leave Act of 1993 (FMLA) Title II, 5 U.S.C. § 6318 et seq. provides for leave for a federal employee:

> [A]n employee shall be entitled to a total of 12 workweeks of leave during any 12-month period for one or more of the following: (C) "In order to care for the spouse, or a son, or a daughter, or parent, of the employee, if such spouse, son, or daughter, or parent has a serious health condition."

Id.§ 6382.

D3 An employing agency may require that a request for leave... be supported by certification issued by the health care provider... of the parent of the employee..." Id. § 6363(a). In any case in which the employing agency has reason to doubt the validity of the certification provided... the employing agency may require, at the expense of the agency that the employee obtain the opinion of a second health care provider...

Id. § 6383(c)(1).

The anti-retaliation provision of Title II, 5 U.S.C. § 6385 states:

An employee shall not directly or indirectly intimidate, threaten, or attempt to intimidate, threaten, coerce, any other employee for the purpose of interfering with the exercise of any rights that such other employee may have under this subchapter.

Lilly Ledbetter Fair Pay Act of 2009- 42 USCS § 2000e-5

APPENDIX E

LETTER #1

Reformatted to Supreme Court Rule 33.1(g)(i).

S. Department of Labor Employment Standards Administration Wage and Hour Division Washington, D.C. 20210 Page 1 of 3 **January 6, 2009 FMLA2009-1-A**

Dear **Name***:

This is in response to your request for clarification of employee notification procedures under the Family and Medical Leave Act (FMLA) as discussed in Wage and Hour Opinion Letter FMLA-101 (January 15, 1999).1 You state that employers believe that opinion letter FMLA-101 prevents them from applying internal call-in policies, disciplining employees under no call/no show policies, or disciplining employees who call in late, as long as the employees provide notice within two business days that the leave was FMLA-qualifying, regardless of whether they could have practicably provided notice sooner. You believe that this

interpretation of the FMLA employee notification requirements "places an untenable burden on employers who are attempting to reasonably schedule their workforce based on foreseeable availabilities of employees and to apply uniform rules on call in to all employees."

The FMLA requires employees to provide notice of the need for leave due to the birth or placement of a child, or for their own serious health condition or to care for a covered family member with a serious health condition, 30 days

E2 before the leave is to begin where possible. *See* 29 U.S.C. § 2612(e). Where it is not possible to provide 30 days notice of the need for such leave, employees must provide "such notice as is practicable." *Id.* The Department of Labor's 1995 FMLA regulations required that when leave is foreseeable less than 30 days in advance, notice must be provided "as soon as practicable," which the regulations clarified "ordinarily would mean at least verbal notification to the employer within one or two business days of when the need for leave becomes known to the employee." 29 C.F.R. § 825.302(b).2 Opinion letter FMLA-101 interpreted this language to bar an employer's attendance policy that required employees taking intermittent FMLA leave to report within one hour after the start of their shift unless they were unable to report due to circumstances beyond their control. The letter stated that "[t]he company's attendance policy imposes more stringent notification requirements than those of FMLA and assigns points to an employee who fails to provide such 'timely' notice of the need for FMLA intermittent leave." Wage and Hour Opinion Letter FMLA-101.

On February 11, 2008, the Department published a Notice of Proposed Rulemaking (NPRM) inviting public comment on proposed changes to the 1995 FMLA regulations. 73 Fed. Reg. 7876. In the NPRM, the Department discussed opinion letter FMLA-101 and the "two-day rule" for FMLA notice at length. The Department stated that it proposed to delete the regulatory language in § 825.302(a) of the 1995 FMLA regulations, which defined "as soon as practicable" as "ordinarily * * * within one or two business days of when

the need for leave becomes known to the employee," because "[w]hile the 'one to two business days' timeframe was intended as an illustrative outer limit, Wage and Hour Opinion Letter FMLA–101 (Jan. 15, 1999), in effect, mistakenly read the regulation as allowing employees two business days from learning of their need for leave to provide notice to their employers, regardless of whether it would have been practicable to provide notice more quickly." *Id.* at 7907. The NPRM went on to state that:

Absent emergency situations, where an employee becomes aware of a need for FMLA leave less than 30 days in advance, the Department expects that it will be practicable for the employee to provide notice of the need for leave either the same day (if the employee becomes aware of the need for leave during work hours) or the next business day (if the employee becomes aware of the need for leave after work hours).

[1] Unless otherwise noted, any statutes, regulations, opinion letters, or other interpretive material cited in this letter can be found at www.wagehour.dol.gov.

[2] The 1995 regulations similarly provide that when the need for leave is unforeseeable, "[i]t is expected that an employee will give notice to the employer within no more than one or two working days of learning of the need for leave, except in extraordinary circumstances where such notice is not feasible." 29 C.F.R. §

E4 825.303(a). *Id.* at 7908. The Department proposed that "absent unusual circumstances, employees may be required to follow established call-in procedures (except one that imposes a more stringent timing requirement than the regulations provide), and failure to properly notify employers of absences may cause a delay or denial of FMLA protections." *Id.* at 7909.

In addressing employee notice of unforeseeable FMLA leave, the NPRM noted that employer comments received in response to the Department's December 2006 Request for Information indicated that "the 'two day rule' interpreted in Wage and Hour Opinion Letter FMLA–101 . . . is even more unworkable in the context of unforeseen FMLA leave because the employee is not required to report the absence prior to the start of his/her shift even where it is practicable to do so." *Id.* at 7910. Accordingly, the Department proposed that when providing notice of the need for unforeseeable FMLA leave "an employee must comply with the employer's usual procedures for calling in and requesting unforeseeable leave, except when extraordinary circumstances exist (or the procedure imposes a more stringent timing requirement than the regulations provide), such as when the employee or a family member needs emergency medical treatment." *Id.* at 7911. The NPRM clarified that, in the absence of extraordinary circumstances, if the employee failed to comply with the normal procedures for reporting an absence "then the employee is subject to whatever

discipline the employer's rules provide for such a failure and the employer may delay FMLA coverage until the employee complies with the rules." *Id.*

The Department published final FMLA regulations (Final Rule) on November 17, 2008, which will become effective on January 16, 2009. 73 Fed. Reg. 67934 (Nov. 17, 2008). In the Final Rule, the Department adopted the proposed revisions regarding the timing of employee notice of the need for FMLA leave with some minor modifications. The Department again noted that the "one to two business days" time frame set forth in the 1995 regulations had been misinterpreted as permitting "employees two business days from learning of their need for leave to provide notice to their employers regardless of whether it would have been practicable to provide notice more quickly." 73 Fed. Reg. 68003. In discussing the proposed changes to § 825.302, the Department stressed that "both current and proposed § 825.302(b) defined 'as soon as practicable' as 'as soon as both possible and practical, taking into account all the facts and circumstances of

the individual case.' The deletion of the 'two-day rule' does not change the fact that whether notice is given as soon as practicable will be determined based upon the particular facts and circumstances of the employee's situation." 73 Fed. Reg. 68003. Thus, final § 825.302(b) states that "[w]hen an employee becomes aware of a need for FMLA leave less than 30 days in advance, it should be practicable for the employee to provide notice of the need for leave either the same day or the next business day. In all cases, however, the determination of when an employee

could practicably provide notice must take into account the individual facts and circumstances." 73 Fed. Reg. 68098. Final § 825.303(a), which addresses the timing of notice for unforeseeable FMLA leave, similarly states that an employee must provide notice to the employer as soon as practicable under the facts and circumstances of the particular case. Specifically, "[i]t generally should be practicable for the employee to provide notice of leave that is unforeseeable within the time prescribed by the employer's usual and customary notice requirements applicable to such leave." 73 Fed. Reg. 68099. In both situations, employees must comply with their employers' usual and customary notice and procedural requirements for requesting leave, absent unusual circumstances. *See* 73 Fed. Reg. 68099 (setting forth section § 825.302(d) ("Complying with employer policy") of the Final Rule); 73 Fed. Reg. 68100 (setting forth section § 825.303(c) ("Complying with employer policy") of the Final Rule). As the Preamble notes:

The Department recognizes that call-in procedures are routinely enforced in the workplace and are critical to an employer's ability to ensure appropriate staffing levels. Such procedures frequently specify both when and to whom an employee is required to report an absence. The Department believes that employers should be able to enforce non-discriminatory call-in procedures, except where an employer's call-in procedures are more stringent than the timing for FMLA notice . . . . In that situation, the employer may not enforce the more stringent timing requirement of its internal policy. Additionally, where

unusual circumstances prevent an employee seeking FMLA-protected leave from complying with the procedures, the employee will be entitled to FMLA-protected leave so long as the employee complies with the policy as soon as he or she can practicably do so. 73 Fed. Reg. 68006; *see* 73 Fed. Reg. 68009 ("[T]he final rule replaces the statement that employees will be expected to give notice to their employers 'promptly' with the statement that it generally should be practicable for the employee to provide notice of leave that is unforeseeable within the time prescribed by the employer's usual and customary notice requirements applicable to such leave."). Accordingly, as stated in the final rule, where an employer's usual and customary notice and procedural requirements for requesting leave are consistent with what is practicable given the particular circumstances of the employee's need for leave, the employer's notice requirements can be enforced. To the degree that Wage and Hour Opinion Letter FMLA-101 has been interpreted to create a flat "two-day rule," the Department is hereby rescinding it. Thus, in the example you cite in your letter of an employer policy requiring employees to call in one hour prior to their shift to report absences and an employee who is absent on Tuesday and Wednesday, but does not call in on either day and instead provides notice of his need for FMLA leave when he returns to work on Thursday, it is our opinion that unless unusual circumstances prevented the employee from providing notice consistent with the employer's policy, the employer may deny FMLA leave for the absence.

E8 This opinion is based exclusively on the facts and circumstances described in your request and is given based on your representation, express or implied, that you have provided a full and fair description of all the facts and circumstances that would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your letter might require a conclusion different from the one expressed herein. You have represented that this opinion is not sought by a party to pending private litigation concerning the issue addressed herein. You have also represented that this opinion is not sought in connection with an investigation or litigation between a client or firm and the Wage and Hour Division or the Department of Labor.

Sincerely,
Alexander Passantino
Acting Administrator

LETTER #2

U.S. Department of Labor Employment Standards Administration Wage and Hour Division Washington, D.C. 20210 **September 14, 2005 FMLA2005-2-A**

Dear **Name***,

This is in response to your request for clarification regarding the application of the medical certification provisions of the Family and Medical Leave Act of 1993 (FMLA), 29 U.S.C. § 2601 *et seq*. You state you understand that an employee who qualifies for FMLA leave for his or her own serious health condition may be asked to provide a new medical certification, not just a recertification, for his or her first FMLA-absence in a new leave year. You request confirmation that a second and third opinion can be sought on this new certification, even though the employee's serious health condition was previously certified, and FMLA leave approved, in previous years. We are aware that your employer is covered under Title I of the FMLA, and we assume for the purposes of this letter that your inquiry relates to eligible employees who have requested andtaken leave in more than one FMLA 12-month leave year for the same qualifying serious health condition.

Background

The FMLA entitles eligible employees of covered employers to take up to 12 weeks of unpaid, job-protected leave in a designated 12-month leave period – with continuation of group health insurance coverage under the same conditions as prior to leave – for specified family and medical reasons.

E10 29 C.F.R. § 825.200(c) permits four methods for determining the 12-month leave period: (1) a calendar year; (2) any fixed 12-month leave year; (3) a 12-month period measured forward from the date any employee's first FMLA leave begins; or, (4) a "rolling" 12-month period measured backward from the date an employee uses any FMLA leave. Once the employer chooses the 12-month leave period, it must be applied consistently and uniformly to all employees, with certain limited exceptions.

Medical certification issued by a health care provider may be requested for FMLA leave for a serious health 14d condition of the employee or the employee's spouse, child, or parent. *See* 29 U.S.C. § 2613 and 29 C.F.R. § 825.305. The purpose of the medical certification is to allow employers to obtain information from a health care provider to verify that an employee, or the employee's ill family member, has a serious health condition, the likely periods of absences, and general information regarding the regimen of treatment. When requested, medical certification is a basic qualification for FMLA-qualifying leave for a serious health condition, and the employee is responsible for providing such certification to his or her employer. If an employee fails to submit a requested certification, the leave is not FMLA-protected leave. See 29 C.F.R. § 825.312(b).

Where the employer has reason to doubt the validity of the medical certification, the employer, at its own expense, may require the employee to obtain a second opinion and, if the employee's health care provider's certification and the

second opinion certification conflict, a third opinion certification. *See* 29 C.F.R. § 825.307.

Subsequent recertification of the same serious health condition may be requested on a reasonable basis. *See* 15d 29 U.S.C. § 2613(e). The regulations define the parameters under which recertification may be requested. *See* 29 C.F.R. § 825.308. Recertification is at the employee's expense unless the employer provides otherwise and second and third opinions may not be required on recertifications (§ 825.308(e)).

Medical Certification in a New 12-Month Leave Period

29 U.S.C. § 2612(a)(1)(C) and (D) of the FMLA entitle an eligible employee to 12 workweeks of leave for a serious health condition during the 12-month period selected by the employer [29 C.F.R. 825.200(b)] – subject to the medical certification requirements in 29 U.S.C. § 2613 of the Act. Medical certification in the new 12-month leave year is similar to the issue of retesting of the 1,250 hours-of-service employee eligibility criterion addressed in the FMLA-112 opinion letter dated September 11, 2000, copy enclosed. In that letter, we opined that an employee's eligibility, once satisfied for intermittent leave for a particular condition, would last through the entire current 12-month period FMLA leave year designated by the employer for FMLA purposes. However, if the employee used leave in a new FMLA leave year, the employer could reassess the employee's eligibility for FMLA leave at that time. Our analysis was consistent with Barron v. Runyon, 11 F. Supp. 2d 676 (E.D. Va. 1998), where the court concluded that

E12 FMLA leave "cannot be taken 'forever' on the basis of one leave request. Instead the statute grants an employee twelve weeks of leave per twelve-month period, not indefinitely." 11 F. Supp. 2d at 683. Given the statutory focus on the leave year, our interpretation regarding new medical certifications is consistent with our interpretation on retesting the 1,250 hours-of-service employee eligibility criterion for the first absence in a new 12-month leave year for employees taking intermittent leave for the same serious health condition. It is our opinion that an employer may reinitiate the medical certification process with the first absence in a new 12-month leave year. A second and third medical opinion, as appropriate, could then be requested in any case in which the employer has reason to doubt the validity of the new medical certification. This is the case despite the fact that the employer had requested recertification
in the previous 12-month leave year. Such a conclusion is also consistent with FMLA's purpose of balancing the interests of employees who need leave with the interests of employers in the operation of their businesses. *See* 29 U.S.C. § 2601(b).

This opinion is based exclusively on the facts and circumstances described in your request and is given on the basis of your representation, express or implied, that you have provided a full and fair description of all the facts and circumstances that would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your request might require a different conclusion than the one expressed

herein. You have represented that this opinion is not sought by a party to pending private litigation concerning the issue addressed herein. You have also represented that this opinion is not sought in connection with an investigation or litigation between a client or firm and the Wage and Hour Division or the Department of Labor.

Sincerely,
Alfred B. Robinson, Jr.
Deputy Administrator
Enclosure: FMLA-112

** Note: The actual name(s) was removed to preserve privacy in accordance with 5 U.S.C. 552 (b)(7).*

LETTER #3

U.S. Department of Labor Employment Standards Administration Wage and Hour Division Washington, D.C. 20210 **May 25, 2004 FMLA2004-2-A**

Dear ***Name****,

Thank you for your letters dated July 7, 1998, addressed to Ms. Michelle Bechtoldt, formerly of the Office of Enforcement Policy, Family and Medical Leave Act Team, in regard to medical recertification issues under the Family and Medical Leave Act of 1993 (FMLA). You have requested clarification of Regulations 29 Part 825 in regard to recertification issues

You agreed in a telephone conversation on February 27, 2004, that it would be appropriate to combine our response to your inquiries in one letter. We apologize for the long delay in providing this response.

The Wage and Hour Division of the U.S. Department of Labor administers the FMLA for all private, state and

local government employees, and some federal employees. Although determinations of coverage, eligibility and other issues of compliance under the FMLA are fact intensive, we trust that the following information will provide the clarification you requested.

1. Minimum recertification period when no minimum duration of capacity is specified in the medical certification.

You understand that the FMLA allows an employer to request recertification every 30 days for pregnancy, chronic or permanent/long term conditions, citing four scenarios involving such conditions, none of which have a minimum duration of incapacity specified in the medical certification.[1] You request that we confirm this understanding or explain our basis for disagreement.

We agree with your understanding, provided the recertification is requested in connection with an absence. Section 103(e) of the FMLA states the employer may require subsequent recertifications "on a reasonable basis." The FMLA regulations at §825.308(a) limit recertification for pregnancy, chronic, or permanent/long-term serious health conditions, when no minimum duration of incapacity is specified

on the medical certification (as discussed in §825.308(b)), to no more often than every 30 days, provided the recertification is done only in connection with an absence. If circumstances have changed significantly, or the employer receives information which casts doubt upon the continuing validity of the certification, recertification may be requested more frequently than every 30 days.

2. Minimum recertification period with Friday/Monday absence pattern.

You understand that a pattern of Friday/Monday absences can constitute "information that casts doubt upon the employee's stated reason for the absence" (§825.308(a)(2)), thus allowing an employer to request recertification more frequently than every 30 days.

E16 We agree with your understanding, provided there is no evidence that provides a medical reason for the timing of such absences and the request for recertification is made in conjunction with an absence. A recertification under these circumstances could thus be justified, for example, if a medical certification indicated the need for intermittent leave for two or three days a month due to migraine headaches, and the employee took such leave every Monday or Friday (the first and last days of the employee's work week). **3. Informing medical provider of pattern of Monday/Friday or apparent excessive absences, and asking for clarification.** You understand that an employer, when requesting medical certification or recertification, may inform the health care provider that the employee has a pattern of Friday/Monday or apparent excessive absences. You add that you understand that an employer who has observed such a pattern of potential abuse may ask the health care provider, as part of the certification (and subsequent recertification) process, if this pattern of absence is consistent with the employee's serious health condition.

This opinion is based exclusively on the facts and circumstances described in your request and is given on the basis of your representation, explicit or implied, that you have provided a full and fair description of all the facts and circumstances which would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your request might require a different

conclusion than the one expressed herein. You have represented that this opinion is not sought by a party to pending private litigation concerning the issue addressed herein. You have also represented that this opinion is not sought in connection with an investigation or litigation between a client or firm and the Wage and Hour Division or the Department of Labor.

We hope that this has been responsive to the questions you have raised. If I can be of further assistance, please do not hesitate to contact me.

Sincerely,

Tammy D. McCutchen Administrator *Note: * The actual name(s) was removed to preserve privacy in accordance with 5 U.S.C. 552 (b)(7).*

[1] Scenario One: An employee's Health Care Provider (HCP) certifies her migraine headaches will last indefinitely. Scenario Two: An employee's HCP certifies a chronic serious health condition (diabetes) and provides no time frame for the duration of the condition. Scenario Three: The employee's chronic serious health condition (asthma) is certified to last for an indefinite period, with possible episodes of incapacity (coinciding with pollen season) over a three month period. Scenario Four: The certification again specifies an indefinite period, but indicates a need for breathing tests and treatments to be conducted over the next three months.

[2] Under the Health Insurance Portability and Accountability Act (HIPAA), 104 P.L. 191, 42 USC 21d

§1320d, covered entities (such as HCPs) are subject to certain standards regarding the use and disclosure of an individual's protected health information. (See 45 CFR Parts 160 and 164, administered by the U.S. Department of Health and Human Services, Office for Civil Rights.) In general, the HIPAA does not prohibit covered entities from releasing an individual's protected health information to that individual. An employee's failure to provide information an employer is entitled to under the FMLA could jeopardize the employee's FMLA leave entitlement.

LETTER #4

U.S. Department of Labor Employment Standards Administration Wage and Hour Division Washington, D.C. 20210 **November 15, 1993 FMLA-17**

Dear **Name***,

This is in response to your request for an advisory opinion under the Family and Medical Leave Act of 1993 (FMLA) regarding mandatory "modified" or "light duty" job programs for temporarily disabled employees.

You ask if an employer can require a temporarily disabled "eligible employee," who seeks FMLA leave for a serious health condition that makes the employee unable to perform the employee's position, to accept an alternative position (with similar pay and benefits) that has been modified to eliminate the essential functions which the employee cannot perform. If so, you ask if the employer can deny the requested FMLA leave and require the employee's presence at work in the modified job.

The FMLA Regulations, 29 CFR Part 825, at § 825.702(d), provide that if FMLA entitles an employee to leave, an employer may not, in lieu of FMLA leave entitlement, require the employee to take a job with a reasonable accommodation. Thus, an employer could not require an employee to work in a restructured job instead of granting the employee's FMLA leave request in the example you posed in your inquiry.

FMLA does not prohibit an employer from accommodating an employee's request to be restored to a different shift, schedule, or position which better suits the employee's

personal needs on return from leave [see § 825.215(e)(4)], but the employee cannot be induced by the employer to accept a different position against the employee's wishes. As noted in your letter, § 825.204 of the regulations addresses temporary transfers to alternative positions with equivalent pay and benefits for employees who request intermittent leave or leave on a reduced leave schedule for planned medical treatment, including for a period of recovery from a serious health condition.

Sincerely,
Maria Echaveste
Administrator

** Note: The actual name(s) was removed to preserve privacy in accordance with 5 U.S.C. 552 (b)(7).*

LETTER #5

April 19, 1994 FMLA-35

Dear **Name***,

This is in response to your inquiry forwarding correspondence from **Name***. **Name*** expresses concern about the Department of Labor's position under the Family and Medical Leave Act (FMLA) as stated in a letter dated November 15, 1993, copy enclosed, that does not allow the employer to require the employee to take a job with a reasonable accommodation in lieu of FMLA leave.

In enacting the law, Congress stated in Section 2, that there is inadequate job security for employees who have serious health conditions that prevent then from working for temporary periods. Congress also stated in Section 2 that it is the purpose of this Act to entitle

E22 employees to take reasonable leave for medical reasons. Pursuant to Section 102(a)(1)(D), an eligible employee is entitled to a total of 12 workweeks of unpaid leave during any 12-month period because of a serious health condition that makes the employee unable to perform functions of the employee's position. Section 104(a)(1)(A) and (B) provides that upon return from FMLA leave, employees must be restored to their original or to an equivalent position with equivalent pay, benefits, and terms and conditions of employment. Section 105 prohibits the employer from interfering with or discriminating against an employee who exercises his or her rights under FMLA.

Guidance provided by the Administrator in the opinion letter referenced by **Name*** is quoted directly from the interim final regulations (copy enclosed) implementing FMLA. The reference may be found at 29 CFR 825.702(d). In the course of developing these regulations, a number of consultations were initiated with other Federal agencies including the Equal Employment Opportunity Commission that took no exception to the language in this section. Public comment on these regulations closed on December 3, 1993.

The Department received approximately 900 comments which are presently being analyzed. In the course of developing the final rule, the Department intends to review each section of the present regulations in light of the public comments and the Department's experience thus far in implementing the statute. While FMLA's requirements do not permit an employer to require an eligible employee to

take a job with a reasonable accommodation instead of taking FMLA leave, other laws such as the Americans With Disabilities (ADA) or state workers' compensation may require employers to offer employees the opportunity to take a restructured job. Under such circumstances, the employer must still afford an employee his or her FMLA rights while at the same time fulfilling the requirements under the respective state or federal law. For example, under a state workers' compensation program, an employer may be required to offer an employee a light duty assignment when the appropriate medical authority has indicated that the person is able to return to work on a limited basis. Such an employee could elect to exercise the remainder of his or her FMLA leave rather than accept the light duty assignment. This does not mean, however, that the employee would be entitled to continue to receive benefits under the workers' compensation program if that program is structured in such a way as to end benefits at the point at which the employee is deemed medically able to accept a light duty assignment and one is offered by the employer. Examples of how FMLA interacts with federal and state anti-discrimination laws, such as the ADA, may be found at Regulations 29 CFR 825.702. I hope that the above fully addresses the concerns expressed by **Name***. If we may be of further assistance, please do not hesitate to contact me. We are returning your constituent's letter as you have requested.

Sincerely,
Maria Echaveste
Administrator
Enclosures

LETTER #6

September 11, 2000 FMLA-112

Dear **Name***,

Thank you for your letter seeking an opinion on how the 1,250 hours of service test applies under the Family and Medical Leave Act of 1993 (FMLA) in determining an employee's eligibility for leave taken intermittently or on a reduced leave schedule due to a qualifying serious health condition.

You specifically inquired about determining the eligibility of a part-time employee who used intermittent FMLA leave on a number of occasions due to a chronic serious health condition (multiple sclerosis or MS). Later in the same year, the employee took six weeks of FMLA leave for another serious health condition (a hysterectomy). Although she had worked 1,356.75 hours in 12 months preceding the commencement of this leave, by the conclusion of the leave, she had dropped below 1,250 hours of service in the preceding year (1,195.25). After her return to work, she again needed leave for her MS. Because she only worked a part-time schedule, she had worked fewer than the required 1,250 hours in the 12 months preceding this latest leave. You cited the decision in Barron v. Runyon, 11 F. Supp. 2d 676 (E.D. Va. 1998), and asked how this court decision would apply in determining this employee's eligibility for FMLA leave for her MS.

The statute defines an eligible employee in Section 101(2)(A)(i) and (ii) as one who has "been employed . . . for

at least 12 months by the employer with respect to whom leave is requested and for at least 1,250 hours of service with such employer during the previous 12-month period." The FMLA Regulations, at 29 CFR § 825.110 (a)(2), provide that the employee must have performed "at least 1,250 hours of service during the 12-month period ***immediately preceding the commencement of leave***." This regulation is consistent with both the Senate and House Committee Reports, which state that "the employee must . . . have worked for the employer for at least 1,250 hours of service during the 12 months period ***immediately preceding the commencement of the leave***." In addition, § 825.110(d) expressly states that determinations of whether an employee has worked for the employer for at least 12 months and for 1,250 hours in the past 12 months must be made "***as of the date leave commences***." The issue, then, is what the term "leave" means—whether it encompasses all leave for the same serious health condition, or whether ***each*** intermittent leave absence for the same condition is considered separate leave under the Act and regulations. The FMLA regulations define intermittent leave as "leave taken in **separate blocks** of time due to a single qualifying reason" (§§ 825.203 and 825.800; emphasis added). This definition is based upon the statutory provisions and the legislative history pertaining to intermittent leave. The FMLA authorizes employees to take intermittent leave or leave on a reduced schedule "when medically necessary." Section 102(b)(1).

The Congressional Committee Reports recognize that some serious health conditions require that an employee be

"absent from work on a recurring basis" rather than for a single block of time, and that "continuing treatment or supervision may sometimes take the form of intermittent visits to the doctor." Intermittent leave may be medically necessary for planned and/or unanticipated medical treatment, or for recovery from a serious health condition. Intermittent leave may be taken for an employee's own or a family member's serious health condition. Congress confirmed that, when an employee uses intermittent leave, only the amount of time actually used may be counted against the 12 weeks of leave to which an employee is entitled. Section 102(b)(1). The intermittent leave concept assumes alternating periods of absence from and presence at work for the same FMLA-qualifying reason. If each such absence were treated as a separate period of FMLA leave, requiring an employee to reestablish eligibility with each absence, there would have been no need for Congress to codify the concept of intermittent leave. Thus, it is our position that the 1,250-hour eligibility test is applied only once, on the commencement of a series of intermittent absences, if all involve the same FMLA-qualifying serious health condition during the same 12-month FMLA leave year. The employee in such a case remains entitled to FMLA leave for that FMLA reason throughout that 12-month period, even if the 1,250-hour calculation is not met at some later point in the 12-month period during the series of related intermittent absences. Once an employee is determined to be eligible for FMLA leave, whether the leave is taken continuously or intermittently, the statute (§ 102(a)) provides for "a total of 12 workweeks of leave during

any 12-month period for one or more" qualifying reasons. The regulations (29 CFR §§ 825.200(b) through (e)) permit an employer to choose from four different methods for determining the 12-month period that will be used to calculate an employee's FMLA leave entitlement. The four methods are the calendar year, any fixed 12-month "leave year," a 12-month period measured forward from the date any employee's first FMLA leave begins, and a "rolling" 12-month period measured backward from the date an employee uses any FMLA leave. Where an employer has selected either the calendar year, fixed year, or the 12-month period measured forward, it is our position that an employee's eligibility, once satisfied, for intermittent FMLA leave for a particular condition would last through the entire current 12-month period as designated by the employer for FMLA leave purposes, for intermittent FMLA leave for a particular condition would last through the entire current 12-month period as designated by the employer for FMLA leave purposes. If an employer uses the rolling backward method, an employee's eligibility for absence due to a particular condition would continue for 12 months from the date of the first FMLA absence for the condition. Under all of these methods, eligibility could be re-calculated at the time of the first absence for the condition after the conclusion of the 12-month period.

E28 Furthermore, it is important to realize that this analysis is separate and distinct from determining whether an eligible employee's leave entitlement has been exhausted. In Barron v. Runyon, the court considered these questions under the FMLA and rendered a decision consistent with our analysis set forth above. In Barron, the court held that an employee need only establish eligibility once at the beginning of the intermittent leave, and "an employee who requests several distinct periods of absence for 'a single qualifying reason' is seeking only one period of intermittent leave." 11 F. Supp. 2d at 682. The court observed that the rule for determining employee eligibility based on whether 50 employees are employed within 75 miles (29 CFR § 825.110(f)) is determined when the employee gives notice of the need for leave and, once eligible, the employee's eligibility is not affected by any subsequent changes in the number of employees employed at or within 75 miles of the employee's worksite, for that specific notice of the need for leave. An employer, for instance, could not terminate FMLA leave after it has commenced if the employee-count drops below 50. The court found this regulation "directly analogous to the situation [that] once an employee is determined eligible based on the number of hours he has worked in the twelve months preceding the first date of the leave, 'the employee's eligibility is not affected by any subsequent change in the number' of hours he worked in the twelve months prior to any subsequent date on which

he takes an absence pursuant to his intermittent leave for the same medical condition." Id. The court also concluded that FMLA leave "cannot be taken 'forever' on the basis of one leave request. Instead, the statute grants an employee twelve weeks of leave per twelve-month period, not indefinitely." 11 F. Supp. 2d at 683. See also Butler v. Owens-Brockway Plastic Products, Inc, 5WH Cases 2d 1281 (6th Circuit 1999), in which the court held that the 1,250 hours of service must be computed from the date of commencement of leave rather than the date of the adverse action that violated the Act.

The following three examples will help to illustrate how an employee's eligibility is determined by FMLA's 1,250-hour test:

1. Assume an employee is diagnosed with an FMLA-qualifying chronic condition, such as MS as in your example, which results in an employee needing intermittent leave due to the episodic nature of the condition. For example, if an employee with MS who was eligible to take intermittent FMLA leave in April and May needed leave again when the episodes of incapacity recurred in July and again in October, the employee would be entitled to FMLA leave without having to re-qualify under the 1,250-hour eligibility test so long as the absences occurred within the same 12-month period and the employee had not exhausted the 12-week leave entitlement for this or any other FMLA-qualifying reason. If the employee needed leave for MS again in a new 12-month period, the employee would have to re-qualify under the 1,250-hour

eligibility test to be entitled to take FMLA leave for the same chronic condition in the new 12-month period. 2. Assume the same facts as in the first example and, in addition, assume that the employee requests FMLA leave for up to six weeks for another serious health condition that requires major surgery and a subsequent period of recovery (e.g., a hysterectomy). If, at the time of this second and different FMLA-qualifying circumstance, the employee met the 1,250-hour eligibility test, the employee would be entitled to FMLA leave for ***that*** (i.e., second) reason. In addition, the employee would also continue to be eligible for intermittent FMLA leave for the chronic serious health condition (i.e., MS) for the remainder of the current 12-month period or until the 12-week leave entitlement has been exhausted. 3. Assume the same facts as in the second example, except at the time of the second and different FMLA-qualifying circumstance the employee does not meet the 1,250-hour eligibility test. In this situation, the employee would not be entitled to FMLA leave for *that* (i.e., second) reason.

Thus, it is possible that an employee could remain eligible for leave for one FMLA-qualifying reason for which prior notice had been given when the employee met the 1,250-hour test (i.e., MS), but not be eligible for FMLA leave for a different FMLA-qualifying reason (i.e., surgery and recovery), due to the 1,250-hour test being re-calculated at the ***commencement*** of the subsequent and separate need for leave.

Our response is based solely upon the information contained in your letter and addresses only the application of the 1,250-hour eligibility test in the context of intermittent leave. We have assumed that all other FMLA requirements are satisfied, or are otherwise not an issue. I trust that our reply is responsive to your request, and apologize for any inconvenience caused by our delay in not being able to respond sooner to your letter. Please contact this office if you have any questions or require further assistance.

Sincerely,
T. Michael Kerr
Administrator

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